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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 217

THE GUARANTY TRUST COMPANY OF NEW YORK, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF HARRIET D. SEWELL, DECEASED, APPELLANT,

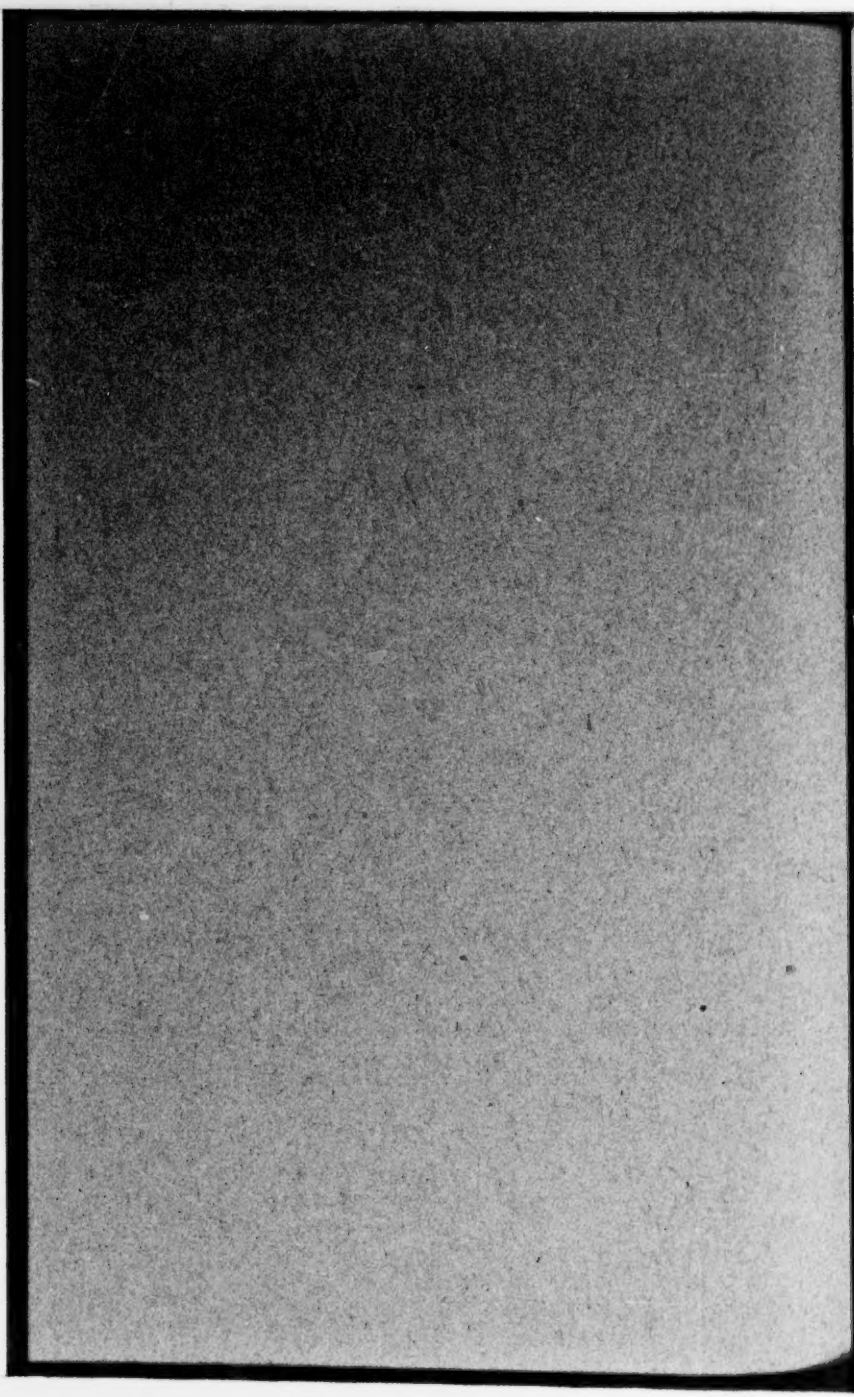
vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, STATE OF CONNECTICUT

FILED JULY 12, 1932

(36,914)



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[fol. 1] [Caption omitted]

IN PROBATE COURT OF DISTRICT OF GREENWICH

PETITION FOR APPEAL

To the Probate Court for the District of Greenwich:

Estate of Harriet D. Sewell, late of Greenwich, within said District, deceased.

The subscriber represents that:

1. He is the Tax Commissioner of the State of Connecticut and as such is interested in said estate.

2. On the 11th day of December, 1930, this Court made the following order and decree, namely, that a certain transfer of property in trust made by said decedent by instrument executed December 28, 1926, is not subject to the Connecticut succession tax.

3. The subscriber is aggrieved by said order and decree [fol. 2] of this court.

Wherefore the subscriber moves an appeal and does hereby appeal from said order and decree to the Superior Court to be held at Bridgeport within and for the County of Fairfield on the first Tuesday of February, 1931, and herewith gives a bond with sufficient surety to prosecute said appeal to effect.

Dated at Hartford this 29th day of December, 1930.

William H. Blodgett, Tax Commissioner, by Farwell Knapp, His Attorney.

(Filed Jan. 28, 1931. Michael J. Flanagan, Clerk.)

Bond on appeal for $100.00 omitted in printing.

IN PROBATE COURT OF DISTRICT OF GREENWICH

ORDER ALLOWING APPEAL

At a Court of Probate, held at Greenwich, within and for the District of Greenwich, on the 30th day of December, A. D. 1930.

Present: Stephen L. Radford, Esquire, Judge.

Estate of Harriet Denmead Sewell, Late of Greenwich, in said District, Deceased

Now comes William H. Blodgett, Tax Commissioner of the State of Connecticut, who states that he is aggrieved by the order and decree of this Court made on the 11th day of December, 1930, finding that a certain transfer of property in trust made by said decedent is not subject to the [fol. 3] Connecticut succession tax, and moves an appeal from said order and decree to the Superior Court to be held within and for Fairfield County on the first Tuesday of February, 1931, and has offered a good and sufficient bond in the sum of One Hundred ($100) Dollars with Farwell Knapp as surety conditioned to pay all costs in case it fails to make its said plea good.

Now therefore, it is ordered, adjudged and decreed that the said appeal be and the same hereby is allowed, the said bond accepted and that notice of said appeal be given by some proper officer or indifferent person, by mailing a true and attested copy of the appeal, bond and order, by registered mail, to the Executor under the will of said deceased, at least twelve days before the return day of said appeal and return of the notice so given be made to said Superior Court.

Stephen L. Randford, Judge.

(Filed Jan. 28, 1931. Michael J. Flanagan, Clerk.)

In Probate Court of District of Greenwich

Reasons of Appeal

Appellant hereby sets out as his reasons of appeal the following:

The Probate Court for the District of Greenwich in its decree of December 11th, 1930, erred.

(1) In deciding that the transfer of property by deed of trust executed by the decedent December 28th, 1926, is not subject to the Connecticut succession tax.

(2) In deciding that said transfer was not made or intended to take effect in possession or enjoyment at or after the death of the donor.

William H. Blodgett, Tax Commissioner, Appellant, by Warren B. Burrows, Attorney General; Farwell Knapp, Assistant Tax Commissioner, His Attorneys.

(Filed Feb. 7, 1931. Michael J. Flanagan, Clerk.)

In Superior Court of Fairfield County

Stipulation of Facts and Questions of Law—Filed April 16, 1931

The parties to the above entitled action hereby stipulate that the facts are as follows:

(1) Harriet D. Sewell died May 20th, 1930, a resident of and domiciled in the Town of Greenwich, County of Fairfield and State of Connecticut, leaving a will dated January 25th, 1927, which will was duly proved and approved by the Probate Court for the District of Greenwich and the Guaranty Trust Company of New York, the executor [fol. 4] named therein, qualified and is now acting as such.

(2) On December 28th, 1926 the decedent and the Guaranty Trust Company of New York duly executed and delivered each to the other an indenture a copy whereof is hereto annexed, marked "Exhibit A". That contemporaneously with the execution and delivery of said instrument, the decedent delivered to said Guaranty Trust Company the securities mentioned in the schedule annexed to said instrument. That immediately thereafter the said Guaranty Trust Company entered upon the performance of its duties under said trust instrument and has ever since said date been in possession of said securities.

(3) That said transfer was not made by the decedent in contemplation of death.

(4) William B. Sewell named in said indenture was the husband of said decedent and survived her.

(5) Madeleine Sewell Barjou named in said indenture was the daughter of said decedent and survived her.

(6) On September 12th, 1930, the executor filed with the Probate Court for the District of Greenwich, in accordance with the provisions of section 1380 (b) of the general statutes, a copy of said indenture (Exhibit A) and a list of the securities constituting the trust fund and their values as of May 20th, 1930. A copy of said list of securities is annexed hereto and marked "Exhibit B."

(7) Said Probate Court in accordance with the provisions of said statute forwarded copies of Exhibits A and B to the Tax Commissioner, Appellant herein.

(8) The Tax Commissioner, appellant herein, did not concede the nontaxability of said transfers, and thereafter and within the time limited in said statute, said Probate Court set a time and place for a hearing as to the taxability of said transfers. At said hearing the parties appeared by their attorneys and were fully heard.

(9) On December 11th, 1930, said Probate Court made the following order and decree, namely: "that the property forming this trust is not subject to the Connecticut inheritance tax."

(10) On December 2nd, 1930, William H. Blodgett, Tax Commissioner, took an appeal from said order and decree of said Probate Court to the Superior Court for the County of Fairfield, to be held on the first Tuesday of February, 1931, and filed a bond pursuant to law to prosecute said appeal to effect.

(11) On February 4th, 1931, said William H. Blodgett, Tax Commissioner, appellant herein, filed in said Superior Court for Fairfield County a statement of reasons of appeal, as on file appears.

The parties hereto respectfully represent to the Court that the questions of law involved are as follows:

(See amended questions of law.)

William H. Blodgett, Tax Commissioner, by Warren [fol. 5] B. Burrows, Attorney General; Farwell Knapp, Inheritance Tax Attorney, His Attorneys. Guaranty Trust Company of New York, Executor, by Hill, Lockwood & Redfield, Its Attorneys.

[File endorsement omitted.]

Exhibit "A" to Stipulation

This indenture made the 28th day of December, nineteen hundred and twenty-six, between Harriet Denmead Sewell, of Greenwich, State of Connecticut, party of the first part, and the Guaranty Trust Company of New York, a corporation organized under the banking laws of the State of New York, having its principal office in the Borough of Manhattan, City and State of New York, hereinafter called the Trustee, party of the second part;

Whereas, the party of the first part desires to create a trust of the property, and for the purposes hereinafter mentioned, now therefore, this indenture.

Witnesseth, that in consideration of the premises, the mutual covenants herein contained, and of other good and valuable considerations, and of the sum of one dollar ($1.00) to the party of the first part in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, the party of the first part has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assign, set over and deliver unto the party of the second part, its successors and assigns, the securities set forth in Schedule A hereto annexed which is made part hereof, to have and to hold the same unto the party of the second part, its successors and assigns, in trust, nevertheless, for the following uses and purposes, and subject to the terms and conditions hereinafter set forth.

1. To invest and reinvest the same; to collect and receive the issues, interest, income and profits therefrom, and after deducting the necessary and reasonable expenses of administering said trust, to pay the net income as and when received to the party of the first part during the term of her natural life.

Upon her death, to continue to invest and reinvest the principal of said trust, and to apply the net income to the use of William B. Sewell, husband of the party of the first part, during the term of his natural life.

Upon, or in case of, the death of the said William B. Sewell, to pay and transfer the principal of said trust to

Madeleine Sewell Barjou, daughter of the party of the first part, to her own use absolutely.

In providing for the above mentioned transfer to her said daughter, the party of the first part desires to express her wish that the said Madeleine Sewall Barjou may see [fol. 6] her way clear to create a trust of said fund with some responsible corporate trustee, to the end that the income therefrom may be secured to her during her life.

In the event that the said Madeleine Sewell Barjou shall predecease both the party of the first part and the said William B. Sewell, then upon the death of the survivor, the entire principal of said trust fund shall be paid and transferred, in equal shares, to the issue of the said Madeleine Sewell Barjou, if any, per stirpes; if none, then to Anna L. McEvoy, or to her issue, per stirpes.

2. Except as otherwise herein provided, the Trustee is hereby given full power of sale of any security or securities which from time to time it may be holding as a part of the principal of said trust fund.

3. The Trustee may in its sound discretion cause the securities which may from time to time comprise the trust fund, or any part thereof, to be registered in its name as Trustee hereunder, or in its own name, or the name of its nominee, or may take and keep the same unregistered, or retain them, or any part thereof, in such condition that they will pass by delivery.

4. During the lifetime of the said William B. Sewell, no purchase or sale of any securities for said trust fund shall be made by the Trustee except by direction of said William B. Sewell. At all times thereafter the same shall be subject to the approval of the party of the first part. No statutory limitation or restriction shall apply to any investments which may be made by the Trustee, nor shall the Trustee be liable for any loss or depreciation incurred by reason of any investments made by it, except such as shall have occurred through its own wilful default or neglect.

5. In case of securities taken or purchased for the trust fund at a premium, the Trustee shall not be required to set aside any part of the income therefrom as a sinking fund to retire or absorb such premium.

6. All stock dividends which may at any time or from time to time be received by the Trustee hereunder shall be considered by it to be wholly principal as far as it may lawfully do so and shall be invested and reinvested in the same manner as hereinabove directed with respect to the original capital of the trust hereby created; provided, however, that all dividends by way of distribution of capital or otherwise made upon any shares of the preferred capital stock of Handy & Harmon, Inc., which may from time to time be held by the Trustee hereunder, shall be deemed to be wholly income and be distributed as such.

7. The Trustee is further authorized and empowered to pay any and all taxes which properly may become payable from time to time under the laws of the United States, or of any state, county or municipality upon said trust property, or for any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws.

8. The party of the first part hereby reserves the privilege of increasing the principal of the trust fund from time to time by adding thereto property and securities which [fol. 7] the Trustee shall receive, hold, manage, invest and reinvest in the same manner as above specified in respect of the property forming the original trust fund.

9. It shall be the duty of the Trustee at the end of each calendar year to render to the beneficiaries an account of the income received for his or her benefit, together with a statement of the source thereof, and further, shall notify each such beneficiary of any default occurring in the payment of the usual interest or dividend upon any security forming the principal of said respective trusts, as and when such default occurs.

10. The Trustee is also authorized in the discharge of its duty to employ counsel and agents, and to determine and pay to them reasonable compensation, and it shall be entitled to reimbursement for the same, and for such other and further expenses and charges as it may deem necessary and proper to incur.

11. The Trustee is authorized and empowered to vote in person or by proxy upon all stocks or other securities of

any corporation held by it from time to time; to vote to dissolve any such corporation, or to increase, decrease or change the character of its capital stock; to join with other stockholders of any company in which it may hold stock or other securities in any agreement having for its object the pooling of such stock or other securities for their mutual benefit in the sale or other disposition thereof; to exchange the securities of any corporation for other securities issued by the same or by any other corporation, at such times and upon such terms and conditions as it shall deem proper; to consent to the recapitalization, reorganization, consolidation or merger of any corporation, and to the sale or lease of its property, or any portion thereof, to any person or corporation, or to the lease by any person or corporation of his or its property, or any portion thereof, to such corporation, and upon such recapitalization, reorganization, consolidation, merger, sale, or lease, to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as it may deem expedient for the protection of its interests as holder of any stocks, bonds, or other securities of any corporation, and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities or take advantage of any rights to subscribe for additional stocks, bonds or other securities, and to make any and all necessary payments therefor, and generally to exercise in respect of all stocks, bonds or other investments held by it all such rights, powers and privileges as are or may be lawfully exercised by any person owning similar property in his own right; provided, however, that the Trustee shall not be required to make any of the payments herein referred to except from the principal of the trust fund, or from funds which may be received for that purpose by the party of the first part. The provisions of this paragraph are subject to the direction and control of the said William B. Sewell during his life; and thereafter subject to the approval of the party of the first part.

12. The Trustee shall be entitled to receive as compensation for its services in the administration of this trust the [fol. 8] commissions allowed to testamentary trustees by the Statutes of the State of New York upon income re-

ceived and paid out, and upon principal the following rates: 2% upon the first $250,000; 1½% upon the next $250,000, and 1% on the balance, payable upon the final termination of the trusts hereby created.

13. The Trustee by joining in the execution of this instrument signifies its acceptance of the trust.

14. It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors of the parties hereto.

15. This instrument is made in duplicate, each of which is an original, but both together shall be deemed to be one and the same.

In witness whereof the party of the first part has hereunto set her hand and seal and the party of the second part has caused these presents to be signed by its Vice-President and its corporate seal to be hereunto affixed the day and year first above written.

Harriet Denmead Sewell. In presence of: R. L. Redfield. Guaranty Trust Company of New York, by R. E. Cocks. Attest: C. H. Schmidt, Asst. Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this 28th day of December, nineteen hundred and twenty-six, before me personally came Harriet Denmead Sewell, to me known, and known to me to be the individual described in and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

W. C. Bloom, Notary Public, Queens County, etc.

STATE OF NEW YORK,
County of New York, ss:

On this 28th day of December, nineteen hundred and twenty-six, before me came Rowland E. Cocks, to me known, who being by me duly sworn, deposes and says that he resides in Bronxville, N. Y.; that he is a Vice-President

of the Guaranty Trust Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

W. C. Bloom, Notary Public, Queens County, etc.

[fol. 9] SCHEDULE "A" TO TRUST DEED

List of Securities Referred to in the Foregoing Deed of Trust

$5,000	Bedford Belt Ry. Co. 1st 5s, 1938.
5,000	Brooklyn Edison Co. Inc. Gen. 5s, Series A, 1949.
5,000	Chic. Gas Light & Coke Co. 1st 5s, 1937.
10,000	Chic. Union Station Co. 1st 5s, Series B, 1963.
5,000	Columbus Gas Co. 1st 5s, 1932.
5,000	Duquesne Light Co. 1st Col. Trust 5½s, Series B, 1949.
5,000	Florida Cent. Peninsula R. R. Co. 1st Cons. 5s, 1943.
5,000	Georgia & Alabama Ry. Co. 1st Cons. 5s, 1945.
5,000	Grand Trunk Western Ry. Co. 1st 4s, 1950.
5,000	Gulf Terminal Co. 1st 4s, 1957.
5,000	Hocking Valley Ry. Co. 1st Cons. 4½s, 1999.
10,000	Humble Oil & Refg. Co. Deb. 5½s, 1932.
5,000	Illinois Central R. R. Co. Sec. 5½s, 1934.
5,000	Intl. Paper Co. 1st Ref. S/F 5s, Series B, 1947.
10,000	Kansas City Southern Ry. Co. Ref. Improv. 5s, 1950.
5,000	Kentucky & Indiana Term. R. R. Co. 1st 4½s, 1961.
5,000	Lake Erie & Western R. R. Co. 1st 5s, 1937.
5,000	Memphis Power & Light Co. 1st Ref. 5s, Series A, 1948.
5,000	Montana Power Co. 1st Ref. S/F 5, Series A, 1943.
5,000	New Orleans & Northwestern R. R. Co. Ref. & Improv. 4½s, Series A, 1952.
5,000	Niagara Falls Power Co. 1st 5s, 1932.
10,000	Northern Pacific Ry. Co. Ref. & Improv. 6s, Series B, 2047.

5,000 Oregon, Wash. Ry. & Nav. Co. 1st Ref. 4s, Series A, 1961.
5,000 Pere Marquette Ry. Co. 1st 5s, Series A, 1956.
5,000 Phila. & Reading Coal & Iron Co. Ref. S/F 5s, 1973.
5,000 Pressed Steel Car Co. Conv. 5s, 1933.
5,000 Prov. of New Brunswick Deb. 6s, Series L, Transfer, 1931.
5,000 Republic Iron & Steel Co. Ref. & Gen. Mtg. S/F 5½s, Series A, 1953.
5,000 San Antonio & Aransas Pass Ry. Co. 1st 4s, 1943.
5,000 Tennessee Coal & Iron & R. R. Co. Gen. 5s, 1951.
5,000 Utica Gas & Elec. Co. Ref. & Ext. 5s, 1957.
5,000 Western Union Tel. Co. Col. Trust 5s, 1938.
5,000 Youngstown Steel & Tube Co. Deb. 6s, 1943.
5,000 Consolidated Gas Co. of N. Y. Deb. 5½s, 1945.
10,000 Kingdom of Norway Ext. S/F 6s, 1944.
5,000 Laclede Gas Light Co. 1st Coll. Ref. 5½s, Series C, 1953.
5,000 Lehigh Valley Harbor Terminal Ry. Co. 1st 5s, 1954.
5,000 Liggett & Myers Tobacco Co. 5s, 1951.
5,000 Pittsburgh Youngstown & Ashtabula Ry. Co. 1st Gen. 5s, 1962.
10,000 St. Paul, Kansas City Short Line R. R. Co. 1st 4½s, 1941.
5,000 Southern Indiana Ry. Co. 1st 4s, 1951.
5,000 State of Queensland, Australia, Ext. S/F 6s, 1947.
10,000 Union Oil of Calif. 6s, Series A, 1942.

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5,000 Wash. & Vandemer R. R. Co. 1st 4½s, 1947.
5,000 Bell Telephone Co. of Canada, 1st 5s, Series A, 1955.
10,000 Commonwealth Edison Co. 1st 5s, 1943.
5,000 Florida East Coast Ry. Co. 1st Ref. 5s, Series A, 1974.
10,000 Gov. of the Argentine Nation Ext. S/F 6s, Series A, 1957.
5,000 Indiana & Michigan Elect. Co. 1st Ref. 5s, 1955.
5,000 Kingdom of Belgium Ext. Loan 6½s, 1949.
5,000 Oklahoma Gas & Elec. Co. 1st 5s, Series A, 1950.

5,000	Penn. Power & Light Co. 1st Ref. 5s, Series D, 1953.
5,000	Santa Fe, Prescott & Phœnix Ry. Co. 1st 5s, 1942.
5,000	Toledo Edison Co. 1st 7s, 1941.
5,000	Wash. Central Ry. Co. 1st 4s, 1948.
5,000	Central of Georgia Ry. Co. Ref. & Gen. 5½s, Series B, 1959.
10,000	German Ext. Loan of 1924, 7s, 1949.
5,000	Indianapolis Gas Co. of Ind. 1st Cons. 5s, 1952.
5,000	Kansas City Southern Ry. Co. 1st 3s, 1950.
10,000	N. Y. Central R. R. Co. Ref. & Imp. 5s, Series C, 2013.
10,000	Nord Ry. Co. 6½s, Ext. S/F 1950.
5,000	Northern States Power Co. 1st Ref. 5s, Series A, 1941.
5,000	Pittsburgh, Shenango & Lake Erie R. R. Co. 1st 5s of 1890, 1940.
5,000	Public Service Gas & Elec. Co. 1st Ref. 5½s, 1959.
5,000	St. Louis, Iron Mt. & Southern Ry. Co. Cons. & Land Grant 5s, 1931.
5,000	Sheffield Farms Co. Inc. 1st Ref. 6½s, 1942.
10,000	Swiss Confederation Ext. Loan 5½s, 1946.
5,000	Union Oil of Calif. S/F 5s, Series C, 1935.
5,000	West Penn. Power Co. 1st 5½s, Series F, 1953.
5,000	Wisconsin Central Ry. Co. Int. Guar. on 3 M P. B. 1st Ref. 4s, 1959.
5,000	Baltimore & Ohio R. R. Co. (Pitts. Lake Erie & W. Va. System) Ref. 4s, 1941.
5,000	Brooklyn Union Gas. Co. 1st Cons. 5s, 1945.
5,000	Central R. R. & Banking Co. of Ga. Coll. Trust 5s, 1937.
5,000	Ches. & Potomac Tel. Co. of Va. 1st S/F 5s, Series A, 1943.
10,000	Chic. & Erie R. R. Co. 1st 5s. 1982.
5,000	Cincinnati, Lebanon & Northern 1st Cons. 4s, 1942.
5,000	City of Rotterdam (Kingdom of Neth.) Ext. S/F 6s, 1964.
5,000	Corn Products Refining Co. 1st S/F 5s, 1934.
5,000	Federal Sugar Refining Co. S/F 6s, 1933.
5,000	Galveston, Harrisburg & San Antonio Ry. of Texas (Mex. & Pac. Ext.) 1st 5s, 1931.
5,000	Hudson County Gas Co. 1st 5s, 1949.
5,000	Indiana Steel Co. 1st 5s, 1952.

5,000 N. Y., Greenwood Lake Ry. Co. P/L 5s, 1946.
5,000 N. Y., Lake Erie & Western Coal & R. R. Co. 1st 5½s, 1942.
5,000 N. Y. State Realty & Terminal Co. (385 Madison Ave.) 5s, Series I, 1932.
5,000 St. Louis & Southwestern Ry. Co. 1st 4s, 1989.
5,000 Southern Calif. Gas Co. 1st 6s, 1950.
5,000 Standard Milling Co. 1st 5s, 1930.
5,000 Central District Tel. Co. 1st S/F 5s, 1943.

[fol. 11]

5,000 Chic. Terre Haute & Southeastern Ry. Co. 1st Ref. 5s, 1960.
10,000 Illinois Bell Tel. Co. 1st Ref. 5s, Series A, 1956.
5,000 Illinois Central R. R. Co. Jt. 1st Ref. 5s, Series A, 1963.
5,000 Manitoba Southwestern Colonization Ry. Co. 1st 5s, 1934.
5,000 Pacific Gas & Elec. Co. 1st Ref. 5½s, Series C, 1952.
5,000 Pittsburgh, Cincinnati & St. Louis Gen. 5s, Series A, 1970.
5,000 South Porto Rico Sugar Co. 1st Coll. S/F 7s, 1941.
5,000 Southern Pacific Co. Conv. 5s, 1934.
5,000 Texas Power & Light Co. 1st 5s, 1937.
5,000 Toronto, Hamilton & Buffalo Ry. Co. 1st 4s, 1946.
100 shs. Carolina, Clinchfield & Ohio Ry. Co. common stock.
50 shs. Electric Bond & Share Co. 6% Preferred stock.
50 shs. Guaranty Trust Co. of N. Y. common stock.

EXHIBIT "B" TO STIPULATION

The following is a list of the securities constituting the principal of the trust created on December 28, 1926 by Harriet D. Sewell, with the values of the same as of the date of the decedent's death, May 20th, 1930:

$5,000.	Bedford Belt Railway Co. 1st 5's due 7/1/38 (Chronicle) @ 97	$4,850.00
5,000.	Chicago Gas Light & Coke Co. 1st 5's due 7/1/37 (N. Y. Stock Exch.) @ 102⅛	5,106.25

10,000.	Chicago Union Station Co. 1st Ser. B. 5's due 7/1/63 (N. Y. Stock Exch.) @ 104½	10,450.00
5,000.	Columbus Gas Co. 1st 5's, due 7/1/32 (N. Y. Stock Exch.) @ 97	4,850.00
5,000.	Florida Central & Peninsular R. R. Co. 1st Cons. 5's due 1/1/43 (N. Y. Stock Exch.) @ 98⅝	4,931.25
5,000.	Georgia & Alabama Rwy. Co. 1st Cons. 5's due 10/1/45 (N. Y. Stock Exch.) @ 84	4,200.00
5,000.	The Grand Trunk Western Ry. Co. 1st 4's due 7/1/50 (Chronicle) @ 86½	4,325.00
5,000.	Gulf Terminal Co. 1st 4's due 1/1/57 (Chronicle) @ 83	4,150.00
5,000.	The Hocking Valley Rwy. Co. 1st Cons. 4½'s, due 7/1/99 (N. Y. Stock Exch.) @ 98¾	4,937.50
10,000.	Humble Oil Co. Deb. 5½'s, due 7/15/32 (N. Y. Stock Exch.) @ 101⅞	10,187.50
5,000.	International Paper Co. 1st & Ref. Ser. B 5's due 1/1/47 (N. Y. Stock Exch.) @ 91	4,550.00
10,000.	Kansas City Southern Rwy. Co. Ref. & Imp. 5's due 4/1/50 (N. Y. Stock Exch.) @ 100⅞	10,087.50
5,000.	Lake Erie & Western R. R. 1st 5's due 1/1/37 (N. Y. Stock Exch.) @ 101	5,050.00
5,000.	Memphis Power & Light Co. 1st & Ref. Ser. A 5's due 1/1/48 (Chronicle) @ 100½	5,025.00

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5,000.	New Orleans & Northeastern R. R. Ref. & Imp. Ser. A 4½'s due 1/1/52 (N. Y. Stock Exch.) @ 95	4,750.00
5,000.	Montana Power Co. 1st Ref. Ser. A 5's due 7/1/43 (N. Y. Stock Exch.) @ 102¼	5,112.50
5,000.	Niagara Falls Power Co. 1st 5's due 1/1/32 (N. Y. Stock Exch.) @ 101½	5,075.00
10,000.	Northern Pacific Rwy. Co. Ref. & Imp. Ser. B 6's due 7/1/2047 (N. Y. Stock Exch.) @ 113⅝	11,362.50

5,000.	Oregon, Washington Rwy. & Navigation Co. 1st & Ref. Ser. A 4's due 1/1/61 (N. Y. Stock Exch.) @ 91	4,550.00
5,000.	Pere Marquette Rwy. Co. 1st Ser. A 5's due 7/1/56 (N. Y. Stock Exch.) @ 104½	5,225.00
5,000.	Philadelphia & Reading Coal & Iron Co. Ref. 5's due 1/1/73 (N. Y. Stock Exch.) @ 87	4,350.00
5,000.	Pressed Steel Car Co. Conv. 5's due 1/1/33 (N. Y. Stock Ex.) @ 79¼	3,962.50
5,000.	Province of New Brunswick Ser. L. Deb. 6's due 7/1/31 (Guaranty Co.) @ 101¼	5,062.50
5,000.	Republic Iron & Steel Co. Ref. Ser. A, 5½'s, due 1/1/53 (N. Y. Stock Ex.) @ 103½	5,175.00
5,000.	San Antonio & Aransas Pass Rwy. Co. 1st 4's due 1/1/43 (N. Y. Stock Ex.) @ 93	4,650.00
5,000.	Tennessee Coal & Iron R. R. Co. 5's due 7/1/51 (N. Y. Stock Ex.) @ 102⅝	5,131.25
5,000.	Utica Gas & Electric Co. Ref. & Ext. 5's due 7/1/57 (N. Y. Stock Ex.) @ 105	5,250.00
5,000.	Western Union Telegraph Co. Collateral 5's due 1/1/38 (N. Y. Stock Ex.) @ 101⅜	5,068.75
5,000.	Consolidated Gas Co. of N. Y. 5½'s, due 2/1/45 (N. Y. Stock Ex.) @ 106	5,300.00
10,000.	Kingdom of Norway Ext. Loan 6's due 8/1/44 (N. Y. Stock Ex.) @ 102¾	10,275.00
5,000.	Laclede Gas Light Co. 1st Coll. Ref. Ser. C 5½'s due 2/1/53 (N. Y. Stock Ex.) @ 102½	5,125.00
5,000.	Lehigh Valley Harbor Terminal Rwy. Co. 1st 5's due 2/1/54 (N. Y. Stock Ex.) @ 105	5,250.00
5,000.	Pittsburgh, Youngstown & Ashtabula Rwy. Co. Genl. 5's due 2/1/62 (N. Y. Stock Ex.) @ 105⅝	5,181.25
5,000.	Liggett & Myers Tobacco Co. 5's due 8/1/51 (N. Y. Stock Ex.) @ 103⅞	5,193.75

10,000.	St. Paul, Kansas City Short Line R. R. 1st 4½'s, due 2/1/41 (N. Y. Stock Ex.) @ 97¾	9,775.00
5,000.	Southern Indiana Rwy. Co. 1st 4's due 2/1/51 (Chronicle) @ 84	4,200.00
5,000.	State of Queensland, Australia, Ext. 6's due 2/15/47 (N. Y. Stock Ex.) @ 100	5,000.00
10,000.	Union Oil Co. of Calif. Ser. A 6's due 5/1/42 (N. Y. Stock Ex.) @ 106	10,600.00

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5,000.	Washington & Vandemere R. R. Co. 1st 4½'s, due 2/1/47 (Chronicle) @ 94	4,700.00
5,000.	Bell Telephone of Canada 1st Ser. A 5's due 3/1/55 (N. Y. Curb Ex.) @ 102⅛	5,106.25
10,000.	Commonwealth Edison Co. 1st 5's due 6/1/43 (Chronicle) @ 104	10,400.00
10,000.	Govt. of the Argentine Nation Ext. 6's due 9/1/57 (N. Y. Stock Ex.) @ 99	9,900.00
5,000.	Indiana & Michigan Electric Co. 1st & Ref. 5's due 3/1/55 (Chronicle) @ 102	5,100.00
5,000.	Oklahoma Gas & Electric Co. 1st Ser. 5's due 3/1/50 (Unlisted Securities) @ 100	5,000.00
5,000.	Kingdom of Belgium Ext. 6½'s due 9/1/49 (N. Y. Stock Ex.) @ 107⅞	5,393.75
5,000.	Pennsylvania Power & Light Co. 1st & Ref. Ser. D 5's due 9/1/53 (N. Y. Curb Ex.) @ 101⅝	5,081.25
5,000.	Santa Fe, Prescott & Phœnix Rwy. Co. 1st 5's due 9/1/42 (N. Y. Stock Ex.) @ 100	5,000.00
5,000.	Washington Central Rwy. Co. 1st 4's due 3/1/48 (N. Y. Stock Ex.) @ 85½	4,275.00
5,000.	Central of Georgia Rwy. Co. Ref. & Genl. Ser. B 5½'s due 4/1/59 (N. Y. Stock Ex.) @ 105	5,250.00
10,000.	German External of 1924 7's due 10/15/49 (N. Y. Stock Ex.) @ 108⅜	10,837.50
5,000.	Indianapolis Gas Co. of Indiana 1st Cons. 5's due 4/1/52 (Chronicle) @ 100	5,000.00
5,000.	Kansas City Southern Rwy. Co. 1st 3's due 4/2/50 (N. Y. Stock Ex.) @ 76	3,800.00

10,000.	N. Y. Central R. R. Co. Ref. & Imp. Ser. C 5's due 10/1/2013 (N. Y. Stock Ex.) @ 107½	10,750.00
10,000.	Nord Rwy. Co. Ext. 6½'s due 10/1/50 (N. Y. Stock Ex.) @ 103⅞	10,387.50
5,000.	Northern States Power Co. 1st & Ref. Ser. A 5's due 4/1/41 (N. Y. Stock Ex.) @ 101⅝	5,081.25
5,000.	Pittsburgh, Shenango & Lake Erie R. R. Co. 1st 5's due 10/1/40 (N. Y. Stock Ex.) @ 101¼	5,062.50
5,000.	St. Louis, Iron Mountain & Southern Rwy. Co. Genl. Cons. Rwy. & Land Grant 5's due 4/1/31 (N. Y. Stock Ex.) @ 100½	5,025.00
10,000.	Swiss Confederation Ext. 5½'s due 4/1/46 (N. Y. Stock Ex.) @ 104¾	10,475.00
5,000.	Union Oil Co. of Calif. Ser. C 5's due 2/1/35 (N. Y. Stock Ex.) @ 99⅞	4,993.75
5,000.	West Penn Power Co. 1st Ser. F 5½'s due 10/1/53 (N. Y. Stock Ex.) @ 104⅝	5,231.25
5,000.	Wisconsin Central Rwy. Co. 1st & Ref. 4's due 4/1/59 (Chronicle) @ 56	2,800.00

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5,000.	Baltimore & Ohio R. R. Co. (Pittsburgh, Lake Erie & West Virginia System) Refunding 4's due 11/1/41 (N. Y. Stock Ex.) @ 93⅝	4,681.25
5,000.	Brooklyn Union Gas Co. 1st Cons. 5's due 5/1/45 (N. Y. Stock Ex.) @ 106⅛	5,306.25
5,000.	Central R. R. & Banking Co. of Georgia Coll. 5's due 5/1/37 (N. Y. Stock Ex.) @ 97¾	4,887.50
5,000.	Chesapeake & Potomac Telephone Co. of Virginia 1st Ser. A 5's due 5/1/43 (Chronicle) @ 102	5,100.00
10,000.	Chicago & Erie R. R. Co. 1st 5's due 5/1/82 (N. Y. Stock Ex.) @ 103⅝	10,362.50
5,000.	Cincinnati, Lebanon & Northern Rwy. Co. 1st Cons. 4's due 11/1/42 (N. Y. Stock Ex.) @ 90	4,500.00

5,000.	City of Rotterdam (Kingdom of Netherlands) Ext. 6's due 5/1/64 (N. Y. Stock Ex.) @ 101⅝	5,081.25
5,000.	Corn Products Refining Co. 1st 5's due 5/1/34 (N. Y. Stock Ex.) @ 102	5,100.00
5,000.	Galveston, Harrisburg & San Antonio Rwy. of Texas (Mexico & Pacific Extension) 1st 5's due 5/1/31 (N. Y. Stock Ex.) @ 100¼	5,012.50
5,000.	Hudson County Gas Co. 1st 5's due 11/1/49 (N. Y. Stock Ex.) @ 102¾	5,137.50
5,000.	N. Y. Greenwood Lake Rwy. Co. Prior Lien 5's due 5/1/46 (N. Y. Stock Ex.) @ 96½	4,825.00
5,000.	N. Y. State Realty & Terminal Co. (385 Madison Ave.) Ser. I 5's due 5/1/32 (Guaranty Co.) @ 99	4,950.00
5,000.	St. Louis & Southwestern Rwy. Co. 1st 4's due 11/1/89 (N. Y. Stock Ex.) @ 86⅝	4,331.25
5,000.	Southern California Gas Co. 1st 6's due 11/1/50 (Pynchon & Co.) @ 104	5,200.00
5,000.	Standard Milling Co. 1st 5's due 11/1/30 (N. Y. Stock Ex.) @ 100¼	5,012.50
5,000.	Central District Telephone Co. 1st 5's due 12/1/43 (N. Y. Stock Ex.) @ 103⅝	5,181.25
5,000.	Chicago, Terre Haute & Southeastern Rwy. Co. 1st Ref. 5's due 12/1/60 (N. Y. Stock Ex.) @ 90½	4,525.00
10,000.	Illinois Bell Telephone Co. 1st Ref. Ser. A 5's due 6/1/56 (N. Y. Stock Ex.) @ 105¼	10,525.00
5,000.	Illinois Central R. R. & Chicago, St. Louis I. New Orleans R. R. Co. Joint Refunding Ser. A 5's due 12/1/63 (N. Y. Stock Ex.) @ 105⅛	5,256.25
5,000.	Manitoba Southwestern Colonization Rwy. Co. 1st 5's due 6/1/34 (N. Y. Stock Ex.) @ 99¼	4,962.50
5,000.	Pacific Gas & Electric Co. 1st & Ref. Ser. C 5½ due 12/1/52 (Pynchon) @ 104¾	5,237.50

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5,000.	Pittsburgh, Cincinnati, Chicago & St. Louis Rwy. Co. Genl. Ser. A 5's due 6/1/70 (N. Y. Stock Ex.) @ 109	5,450.00
5,000.	Southern Pacific Co. Conv. 5's due 6/1/34 (N. Y. Stock Ex.) @ 102½	5,125.00
5,000	Texas Power & Light Co. 1st 5's due 6/1/37 (Pynchon) @ 100½	5,025.00
5,000.	Toronto Hamilton & Buffalo Rwy. Co. 1st 4's due 6/1/46 (N. Y. Stock Ex.) @ 89	4,450.00
5,000.	N. Y. Lake Erie & Western Coal & R. R. Co. 1st 5½'s due 5/1/42 (N. Y. Stock Ex.) @ 101	5,050.00
10,000.	Kresge Foundation Coll. 6's due 6/1/36 (N. Y. Stock Ex.) @ 103½	10,350.00
3,000.	Shawinigan Water & Power Co. 1st Coll. Ser. A 4½'s due 10/1/67 (Pynchon) @ 94½	2,835.00
5,000.	Bell Telephone of Canada 1st Ser. B 5's due 6/1/57 (N. Y. Curb Ex.) @ 102½	5,112.50
5,000.	Chicago & Northwestern Rwy. Co. Conv. Ser. A 4¾'s due 11/1/49 (N. Y. Stock Ex.) @ 101½	5,075.00
1,000.	Kentucky & Indiana Terminal R. R. 1st 4½'s due 1/1/61 (N. Y. Stock Ex.) @ 85½	4,275.00
100 shs.	Carolina Clinchfield & Ohio Rwy. Co. common $4. $100 p. v. (Virginia corp.) (N. Y. Stock Ex.) @ 86¼	8,625.00
50 "	Electric Bond & Share Co. 6% pfd. no par (N. Y. corp.) (N. Y. Curb Ex.) @ 108⅞	5,443.75
50 "	Bethlehem Steel Corp. Cum 7% Pfd. $100 p. v. (N. J. corp.) (N. Y. Stock Ex.) @ 131⅛	6,556.25
50 "	United Cigar Stores of America 6% Pfd. $100 p. v. (N. J. corp.) (N. Y. Stock Ex.) @ 49½	2,475.00
50 "	Kansas City Power & Light Co. 1st Pfd. Ser. B 6% no par (Mo. corp.) (N. Y. Stock Ex.) @ 112⅝	5,631.25

25 shs.	Pacific Lighting Corp. 6% pfd. no par (Calif. corp.) (Los Angeles Stock Ex.) @ 102¼	2,556.25
85 "	Guaranty Trust Co. of N. Y. c/s $100 p. v. (N. Y. corp.) (N. Y. Times) @ 768	65,280.00
	Balance on deposit with Guaranty Trust Company, New York	68.21
		$632,533.21

IN SUPERIOR COURT OF FAIRFIELD COUNTY

STIPULATION FOR RESERVATION TO THE SUPREME COURT OF ERRORS—Filed May 8, 1931

It is hereby stipulated by the parties to this cause, appearing herein by counsel, that the above entitled cause may be reserved for the advice of the Supreme Court of Errors upon the statement of facts set forth in the stipula-
[fol. 16] tion dated April 14th, 1931, and on file in said cause, and upon the questions of law set forth in said stipulation as filed. And further that the present determination of the above questions of law will be in the interest of simplicity, directness and economy in judicial action because the facts agreed upon as set forth in said stipulation are all the facts in the above entitled action and because the determination of the questions of law set forth in said stipulation will be a final determination of said cause and because said questions of law are of great public importance and of great practical importance to the parties thereto.

For the reasons above stated, the parties hereby request that the questions above set forth be reserved for the advice of the Supreme Court of Errors.

William H. Blodgett, Tax Commissioner, by Warren B. Burrows, Attorney General; Farwell Knapp, Inheritance Tax Attorney, His Attorneys. Guaranty Trust Company of New York, Executor, by Hill, Lockwood & Redfield, Its Attorneys.

[File endorsement omitted.]

IN SUPERIOR COURT OF FAIRFIELD COUNTY

AMENDMENT TO STIPULATION OF QUESTIONS OF LAW—Filed June 19, 1931

The questions of law set out in the stipulation filed in this court on or about April 14th, 1931, are hereby amended to read as follows:

(1) Did the property which was the subject of transfer by the indenture dated December 28th, 1926, Exhibit A. "pass by deed, grant or gift * * * intended to take effect in possession or enjoyment at the death of the grantor or donor", within the meaning of the Connecticut succession tax statute, in force at the date of the execution of said deed, or within the meaning of any subsequent amendment or revision of said succession tax statute?

(2) If said transfer is held to be taxable within the meaning of the applicable succession tax statute, would the imposition of such tax offend against Amendment XIV of the Constitution of the United States or against any other provision of said Constitution?

(3) If said transfer is held taxable, as of what date should the property be valued for the purpose of computing such tax?

(4) If said transfer is held taxable, is the tax to be computed upon the whole value of the property transferred, or upon the then present value of the reserved life estate or, upon the then present value of the remainders?

[fol. 17] (5) Did the Probate Court for the District of Greenwich err in its decree of December 11th, 1930, finding that said transfer was not subject to the Connecticut succession tax?

William H. Blodgett, Tax Commissioner, Appellant, by Warren B. Burrows, Attorney General; Farwell Knapp, Assistant Tax Commissioner, His Attorneys. Guaranty Trust Company of New York, Executor, Hill, Lockwood & Redfield, Its Attorneys.

[File endorsement omitted.]

IN SUPERIOR COURT OF FAIRFIELD COUNTY

RESERVATION—Filed June 23, 1931

At the request of and by the consent of the parties to this action appearing by counsel, the Court reserved the questions of law which said parties have raised, as appears in the pleadings and by the stipulation on file for the advice of the Supreme Court of Errors within and for the Third Judicial District, as to what judgment, decree or decision should be made or rendered thereon by this Court.

Dickenson, Judge.

[File endorsement omitted.]

SUPREME COURT OF ERRORS, THIRD JUDICIAL DISTRICT, FAIRFIELD COUNTY

Clerk's Office

The above and foregoing is a true copy of the record in said case to be used in the trial in the Supreme Court of Errors.

Michael J. Flanagan, Clerk.

[fol. 18] IN SUPREME COURT OF ERRORS OF CONNECTICUT

#34860

WILLIAM H. BLODGETT, Tax Commissioner,

vs.

APPEAL FROM PROBATE (Est. of Harriet D. Sewell)

JUDGMENT—Jan. 27, 1932

"We answer the questions propounded as follows:

(1) to the first question, that the property which was subject of transfer passed by deed, grant or gift intended to take effect in possession or enjoyment at the death of the grantor or donor within the meaning of the Connecti-

cut Succession Tax statute in force at the execution of the instrument of transfer; (2) to the second question, that the imposition of such tax thereon transgresses no provision of the United States Constitution; (3) to the third question, that the property should be valued as of the date of the death of the decedent; and (4) to the fourth question, that the tax should be computed on the valuation made as stated in the answer last preceding.

(Opinion by Hinman, J.)"

[fol. 19] In Supreme Court of Errors of Connecticut, October Term, 1931

William H. Blodgett, Tax Commissioner. Appeal from Probate (Estate Harriet D. Sewell)

William D. Blodgett, Tax Commissioner,

vs.

Winchester Bennett et al., Executors

Hamilton Gibson, Administrator C. T. A.,

vs.

William H. Blodgett, Tax Commissioner

William H. Blodgett, Tax Commissioner,

vs.

Middletown Trust Company, Trustee (Estate Wilbur F. Starr)

Maltbie, C. J.; Haines, Hinman, Banks and Avery, Js.

Appeals involving the application of the Connecticut Succession Tax statute to certain transfers of property, three taken by the State Tax Commissioner as follows; from a decree of the Court of Probate for the district of Greenwich to the Superior Court in Fairfield County and reserved by that court, Dickenson, J., for the advice of this court; from a decree of the Court of Probate for the district of New Haven to the Superior Court in New Haven

County and reserved by that court, Inglis, J., for the advice of this court; and from a decree of the Court of Probate for the district of East Hampton to the Superior Court in Middlesex County and reserved by that court, John Richards Booth, J., for the advice of this court; also one taken by the administrator c. t. a. from a decree of the Court of Probate for the district of Washington, taken to the Superior Court [fol. 20] in Litchfield County and reserved by that court, Inglis, J., for the advice of this court.

Farwell Knapp, Inheritance Tax Attorney, with whom, on the brief, was Warren B. Burrows, Attorney General, for the Tax Commissioner.

Charles M. Lyman, with whom was Clarence W. Bronson, for Hamilton Gibson, Administrator c. t. a.

James E. Wheeler, for Winchester Bennett et al., executors.

Alvan Waldo Hyde, for Middletown Trust Company, trustee.

Alvan Waldo Hyde, with whom, on the brief, was R. L. Redfield, of New York City, for Guaranty Trust Company of New York, executor.

OPINION

HINMAN:

Harriet D. Sewell died May 20th, 1930, domiciled in Greenwich. On December 28th, 1926, she executed an irrevocable deed of trust to a New York Trust Company of certain securities therein described in which deed it was provided that the trustee collect the income and pay it to Mrs. Sewell during her life; upon her death the income was to be paid to her husband during his life, and upon his death the trustee was directed to pay and transfer the principal of the trust absolutely to their daughter, if she survive, but if not, then to the issue of the daughter, with a gift over in default of such issue.

Thomas G. Bennett died August 19th, 1930, domiciled in New Haven. On June 18th, 1921, he executed and delivered a warranty deed conveying to his three children four pieces of land with the dwelling house and other buildings thereon located in New Haven, reserving to himself "the use, improvements, occupation, enjoyment, and income from said

premises, for and during the full term of (his) natural life." The real estate so conveyed had long been and thereafter remained the grantor's home and he continued [fol. 21] to live there until his death.

Emma L. B. Gibson died April 9th, 1930, always having been domiciled in Washintgon, Connecticut. On May 4th, 1918, she gave a deed of certain real estate in Washington to a trustee reserving to herself the net income thereof for her life with remainder at her death to her son in fee or, if he should not survive, to her grandchildren in fee. No question is made as to the taxability of this transfer. On April 5th, 1918, Mrs. Gibson executed in New York an irrevocable trust deed covering certain intangible personal property consisting of stocks, bonds, and a check drawn by her to the order of the trustee. By the terms of the deed, the net income was required to be paid to the settlor during her life and at her death the principal to her son or, in case he did not survive, to the settlor's grandchildren. The trustee was at all times domiciled in New York, and the certificates of stock and the bonds were located in that State.

Wilbur F. Starr died July 23d, 1929, domiciled in East Hampton. On May 31st, 1928, he and his wife (who survived him) transferred by one trust deed certain real estate in East Hampton and certain securities, each contributing equal shares, to a trustee. It was provided that the income be paid to or for the benefit of either of the donors during their joint lives, upon the death of one to the survivor for his or her life, the donors to have the use and occupancy of any real estate forming a part of the trust, and provision was made for the distribution of the fund upon the death of both to certain other persons and corporations. The tax commissioner claimed that the one-half of the fund contributed by the decedent was taxable.

The four cases involve, and the reservations present, the same general questions and were argued together in this [fol. 22] court.

The first question reserved in each case is: Did the property which was the subject of transfer "pass by deed, grant, or gift * * * intended to take effect in possession or enjoyment at the death of the grantor or donor"

within the meaning of the Connecticut succession tax statute, in force at the date of the deed, or within the meaning of any subsequent amendment or revision of said succession tax statute?

The common and perhaps not unnatural aversion of property owners to the burden of taxation appear- to have applied with special force to the diminution of the estates left by them at death through the imposition of estate, inheritance, or succession taxes. The early statutes taxing property passing by will or inheritance were followed by resort to various means for avoiding subjection to the tax. Among the devices most simple and commonly resorted to were gifts in contemplation of death, and transfers, in trust or otherwise, whereby the transferor reserved to himself the life use or income for life. These artifices were met by provisions in the taxing statutes calculated to close such avenues of tax avoidance. In consequence, the inheritance tax statutes of most of the States imposing taxes of that character include among the taxable transfers those made in contemplation of death and those intended to take effect in possession or enjoyment at or after the transferor's death. The Federal estate tax, on the transfer of a decedent's net estate, includes in the gross estate property to the extent of any interest therein of which the decedent has, during his lifetime, made a transfer or created a trust intended to take effect in possession or enjoyment at or after the death of the transferor or settlor.

The original Connecticut Act, Chapter 180, Public Acts [fol. 23] 1889, Sec. 1, included provisions for a tax on "property within the jurisdiction of this State, and any interest therein, * * * which shall pass * * * by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, in trust or otherwise". In 1897 (Public Acts, Chap. 201) this provisions does not appear, but it was restored, in substance, by Sec. 3 of Chapter 332, Public Acts of 1915, and has since continued unchanged in any respect materially affecting the present inquiry. General Statutes (1918) Secs. 1261-1271; Public Acts 1929, Chap. 299, Secs. 1 and 2; General Statutes (1930) Chap. 77, Secs. 1360, 1361.

These provisions of State and Federal statutes have occasioned an immense amount of litigation, although Con-

necticut has been conspicuously free therefrom. The most cursory review of the cases on this subject is impracticable here. The general subject is exhaustively covered in an article by Professor Rottschaefer of the University of Minnesota, in the Minnesota Law Review, April and May, 1930. See also Gleason and Otis, "Inheritance Taxation" (4th Ed.) p. 380 et seq. The more recent cases are collected in A. L. R. annotations, Vol. 49, p. 864 et seq. and Vol. 67, p. 1247 et seq. It is sufficient for present purposes to state that for a long period the power of the states constitutionally to enact such provisions, at least of prospective application, has not been regarded as open to question. None of the transfers involved in the cases now under consideration involve retrospective operation of the law, questions of construction as to whether the gift took effect, in possession or enjoyment, in the ultimate beneficiaries or in persons other than the transferor, before his death, or other complications which have furnished occasion for a large part of the litigation. Transfers such as here involved, except in the Bennett case, that is, to trustees to pay the income to the [fol. 24] transferor during life with directions that upon his death the corpus shall be paid to designated beneficiaries, though the trust be revocable, have been held by practically all courts, Federal and State, to fall within the meaning of a transfer intended to take effect in possession or enjoyment at or after the death of the transferor, and therefore subject to tax under statutes covering transfers of the class last mentioned. 49 A. L. R. p. 878, 67 A. L. R. p. 1250.

This court has not had occasion to pass directly upon the question, freed from the element of retrospective operation, but our full concurrence with the general view just stated is clearly indicated in Blodgett v. Union & New Haven Trust Co., 97 Conn. 405, 410, 116 Atl. 908. We there pointed out that the "qualifying and enlarging phrase" "in possession or enjoyment" included in our original succession tax Act (1889), dropped from the law in 1897, and reinserted in 1915 "mark the difference between a tax on the privilege of succeeding to the property of a decedent, and a tax on the privilege of succeeding to the possession and enjoyment of property which the decedent has conveyed away during his lifetime, reserving only a right to the income during his own life."

The raising of the question we are now considering appears to be due to the construction placed, by the representatives of the several estates involved, upon certain recent decision of the Supreme Court of the United States, as evincing a departure in effect from the decisions above referred to and lending encouragement to a renewed attack upon the provision under consideration and its applicability to the facts of cases such as those now before us. In Reinecke v. Northern Trust Co. (1929) 278 U. S. 339, 49 Sup. Ct. 123, there were involved five trusts in which the [fol. 25] settlor did not reserve any life use to himself, but the income was made payable to another and each trust was to terminate five years after the settlor's death or on the death of the respective life tenants, whichever should first occur, with remainders over to others. The settlor retained no interest either as to principal or income, only reserving a right to revoke each trust with the consent of the life tenant. It was held that since the power to revoke was dependent on the consent of the one entitled to the beneficial and consequently adverse, interest, the trusts had passed as completely from any control by the settlor which might benefit him as if the gifts had been absolute.

May v. Heiner (1930) 281 U. S. 238, 50 Sup. Ct. 286, concerned an irrevocable trust providing that the income be paid to settlor's husband during his life; at his death, if settlor survived him, the income to be paid to her during her lifetime; and on her death, or on her husband's death if he survived her, the trust to cease and the principal be paid to the settlor's children. The record fails clearly to disclose whether Mrs. May, the settlor, survived her husband, but this is stated by the opinion to be "not of special importance." It was held that "at the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event." The conclusion that the property embraced in the trust was not subject to the Federal estate tax appears to be based on the Reinecke case, from which the opinion quotes: "In the light of the general purpose of the statute and the language of Sec. 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful

[fol. 26] whether the trusts or interests in a trust intended to be reached by the phrase in Sec. 402 (c), 'to take effect in possession or enjoyment at or after his death', include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under Sec. 401. That doubt must be resolved in favor of the taxpayer. * * *''

It is stated in Milliken v. United States (1931) 285 U. S. 15, 19, 51 Sup. Ct. 324, 326, that in the Reinecke case and May v. Heiner "the only relevant question was one of construction whether (the gifts) were of the class intended by Congress to be taxable under Sec. 402 (c) as transfers 'intended to take effect in possession or enjoyment at or after death.' "

Commissioner v. Northern Trust Co. and Morsman v. Commissioner, 283 U. S. 782, 783, 51 Sup. Ct. 342, 343, 75 L. Ed. 1412, involved irrevocable trusts wherein the settlor reserved a life use with remainders over. In McCormick v. Commissioners, 283 U. S. 784, 51 Sup. Ct. 343, 75 L. Ed. 1413, the trust instrument provided that the income should be accumulated and added to principal except that if in any year the settlor's net income should be less than a specified amount she could take from the trust income enough to make up the deficiency, and that the trustee should pay out of that income any amount to charities which she might designate. Remainders over after her death were created in the settlor's three children and there was a further provision that if the settlor survived her children (which did not occur) the entire trust property should revert to her. These three cases were argued on the same day, February 27th, 1931, and decided March 2d, 1931, by Per Curiam opinions stating in each case that "there being no question of the constitutional authority of the Congress to impose prospectively a tax with request to transfers or trusts of the sort here involved," "the question * * * [fol. 27] is that of construction of Sec. 402 (c) of the Revenue Act of 1921 * * * a provision similar to that of Sec. 402 (c) of the Act of 1918 * * * which has already been construed by this court." And it was held "upon authority of May v. Heiner" that the property transferred under the deed of trust was not subject to the Federal estate tax as a transfer intended to take effect in

possession or enjoyment at or after the decedent's death. Investigation of the records and briefs in these cases confirms the impression given by the opinions that, as in May v. Heiner, the only question considered and decided was one of construction. No question was made as to constitutional authority to impose, prospectively, a tax upon such transfers or trusts.

It is interesting and significant that on the day following that on which these three cases were decided, Congress adopted an amendment to Sec. 402, (c) expressly including within transfers made in contemplation of or intended to take effect in possession or enjoyment at or after death, "a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property, or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom." It is obvious from the quotation from the opinion in the Reinecke case which we have given above, that the decision, upon which the succeeding cases relied, was motivated by the nature of the Federal estate tax, which is upon the transfer of, rather than the succession to, property of the decedent. Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747; Y. M. C. A. of Columbus v. Davis, (1925) 264 U. S. 47, 44 Sup. Ct. 291; Edwards v. Slocum (1924) 264 U. S. 61, 62, 44 Sup. Ct. 293. "The tax is on the act of the testator, not on the receipt of property by the legatees". Ithaca Trust Co. v. United States (1929) 279 U. S. 151, 155, 49 Sup. Ct. 291; Corbin v. [fol. 28] Townshend, 92 Conn. 501, 505, 103 Atl. 607; Gleason & Otis, Inheritance Taxation (4th Ed.) p. 2 et seq. On the other hand, with a few exceptions, the State Inheritance tax statutes levy a duty or excise upon the beneficiary for the privilege or right of succession to property. Silberman v. Blodgett, 105 Conn. 192, 205, 134 Atl. 778; Gleason & Otis, Inheritance Taxation (4th Ed.) p. 4. The Connecticut tax is of this nature. Blodgett v. New Britain Trust Co., 108 Conn. 715, 720, 145 Atl. 56; Bankers Trust Co. v. Blodgett, 96 Conn. 361, 365, 114 Atl. 104. The Federal cases above mentioned which are relied upon in support of the claim that the transfers here in question are not taxable, since they "deal with the construction of Federal statutes imposing estate taxes * * * are distinguishable because of the terms of those statutes, if not on other grounds."

Worcester County National Bank v. Commissioners of Corporations and Taxation, Mass. —, 175 N. E. 726, 728. We have been able to discover no relevant subsequent case which has given these decisions an effect adverse to the taxability of such gifts under State succession tax statutes. See In re Barber's Estate (April 13th, 1931) 304 Pa. St. 235, 155 Atl. 565; City Bank Farmers Trust Co. v. McCutcheon (April 24th, 1931) N. J. L. —, 151 Atl. 78, 154 Atl. 625; In re Best's Estate (April 30th, 1931) 249 N. Y. Supp. 784; Matter of Barstow (May 22nd, 1931) 256 N. Y. 647, — N. E. —. Therefore, we feel that we are not constrained to place a similar construction upon our own statute and are still at liberty to adhere to the view as to its meaning and scope which usually have been held as to State statutes of similar nature and terms which we indicated in Blodgett v. Union & New Haven Trust Co. supra; these lead to the conclusion that the property which was the subject of transfer was within the meaning of the statute, and taxable accordingly. "The transaction was within the description of the statute. The property passed from the decedent to the beneficiary 'by deed, grant or gift.' Though upon the creation of the trust an equitable remainder in the trust fund, after the life estate of the decedent in such fund, [fol. 29] vested in interest in the beneficiary, she was not entitled to 'possession or enjoyment' of the fund or any part of it until the death of the decedent. * * * Her present right to the future 'possession or enjoyment' of the trust fund, which was 'vested' in the sense of being assignable and transmissible by her during the life of the decedent * * * was not 'possession or enjoyment' within the meaning of the statute. The statute recognizes the familiar distinction between taking effect in possession or enjoyment and vesting in right, title or interest. * * * Apparently the legislature intended to reach for the purpose of taxation the shifting of the enjoyment of property—the 'economic benefits' thereof or 'economic interest' therein (compare Saltonstall v. Saltonstall, 276 U. S. 260, 271, 48 Sup. Ct. 255, 72 L. Ed. 565; Reinecke v. Northern Trust Co., 278 U. S. 339, 346, 49 Sup. Ct. 123, 73 L. Ed. 410, 66 A. L. R. 397)—from a former owner at his death, even though such shifting of enjoyment followed necessarily from a prior transfer of title inter vivos. As was said in State Street Trust Co. v. Treasurer & Receiver General,

209 Mass. 373, 379, 95 N. E. 851, 852, 'The policy of the law is, that the owner of property shall not defeat or evade the tax by any form of conveyance or transfer, where after death the income, profit or enjoyment enures to the benefit of those who are not exempted." Worcester County National Bank v. Commissioner of Corporations and Taxation, supra.

As to the conveyance in the Bennett case "though the grantee * * * becomes the owner upon delivery of the deed in such sense that his title may be subject to levy and seizure, and only time is wanting to make a title which includes the right to possession and enjoyment, the legislature may subject him who takes such a conveyance to a collateral inheritance tax. It is well settled that reservation of a life estate is such a postponement of possession [fol. 30] and enjoyment as that the tax attaches, under such a statute as we have. Reish v. Commonwealth, 106 Pa. St. 521." Brown v. Guilliford, 181 Iowa, 897, 898, 165 N. W. 182.

The next question, common to all of the cases, is, does the imposition of such a tax offend against Amendment XIV, or any other provision of the Constitution of the United States? A negative answer is so decisively indicated that, beyond what has already been said, extended discussion is unnecessary. The constitutionality of taxation of transfers at death was long since upheld (Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747) and has been consistently maintained. The power of a State to tax transfers to take effect in possession or enjoyment at or after death was recognized in Nickel v. Cole, 256 U. S. 222, 41 Sup. Ct. 467. The same considerations apply to transfers of this kind as to gifts in contemplation of death. Of the latter it has recently been said: "It is sufficient for present purposes that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substituted for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present (United States) statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. It is thus an

enactment in aid of, and an integral part of, the legislative scheme of taxation of transfers at death. * * * "We hold, as this court has several times intimated, that the inclusion of this type of gifts in a single class with decedents' estates to ensure equality of taxation, and prevent evasion of estates taxes, is a permissible classification of an appropriate subject of taxation," citing numerous cases. Milliken v. United States (1931) 283 U. S. 15, 20, 23, — Sup. Ct. —.

[fol. 31] Analogous also, for present purposes, is the inclusion in the Federal system of death taxes, of estates by the entirety. "As was pointed out in Tyler v. United States (281 U. S. 497; 50 Sup. Ct. 356) pp. 503-505, such estates are appropriate subject of death taxes * * * they resemble gifts made in contemplation of death likewise taxed by the estate tax provisions of the 1916 and later revenue acts." (Citing Milliken v. United States, supra.) Phillips v. Dime Trust & Safe Deposit Co. (1931) 284 U. S. —, 52 Sup. Ct. 46. As hereinbefore noted, the decisions in May v. Heiner, and the Morsman, Northern Trust Co., and McCormick cases, supra, did not concern or affect the constitutional question.

It was stated in Blodgett v. Union & New Haven Trust Co. 97 Conn. 405, 410, 116 Atl. 908, that "nobody doubts the right of the State to tax the privilege of succeeding to the possession and enjoyment of property under what the United States Supreme Court has called 'artificial and technical estates with limitations over.'" Citing Keeney v. New York, 222 U. S. 525, 32 Sup. Ct. 531. We conclude that there is no constitutional obstacle to the tax.

The further contention is advanced on behalf of the Gibson estate that although such transfers, in general, be held to be taxable, the personalty trust in that case is not so subject to taxation by Connecticut, because Mrs. Gibson, although domiciled in Connecticut, while temporarily in New York executed there the contract placing in trust with a New York trustee the intangible personal property—stocks, bonds, and a check on a New York bank—the physical evidences of which were also in the latter State. As to the basic principle involved, the situation appears to be indistinguishable from that applicable in cases, such as

Silberman v. Blodgett, 105 Conn. 192, 134 Atl. 778, 277 U. S. 1, 48 Sup. Ct. 410, in which it has been held that intangible [fol. 32] personalty, although physically outside the State of the domicil of the owner, has such a situs at the domicil that its transfer on the death of the owner may be subjected to inheritance tax under the laws of the State of domicil. First Natl. Bank of Boston v. Maine (1932) 284 U. S. —, — Sup. Ct. —; Bankers Trust Co. v. Greims, 110 Conn. 36, 147 Atl. 290; Blodgett v. New Britain Trust Co., 108 Conn. 715, 720, 145 Atl. 56; Hopkins' Appeal, 77 Conn. 644, 60 Atl. 657; Gallup's Appeal, 76 Conn. 617, 57 Atl. 699. The succession tax is "prescribed in view of the death of a domiciled resident of this State whose land within this State and whose personal property, wherever situate, is governed as to its disposition, distribution and succession, by the laws of this State." Hopkins' Appeal, supra, p. 649. This consideration extends to transfers of the nature here involved. "There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance." Keeney v. New York, supra, p. 534.

Bullen v. Wisconsin (1916) 240 U. S. 625, 36 Sup. Ct. 473, upheld subjection, by Wisconsin, to an inheritance tax on the fund under a trust the circumstances of creation (in Illinois) and the nature of which appear to be in all essential respects analogous to the Gibson trust. State court cases to a similar effect include Lines' Estate, 155 Pa. St. 378, 26 Atl. 728; Countess de Noailles' Estate, 236 Pa. St. 213, 84 Atl. 665; In re Fulham's Estate, 96 Vt. 308, 119 Atl. 433; Douglas County v. Kountze, 84 Neb. 506, 121 N. W. 593. MacClurkan v. Bugbee, 102 N. J. L. 192, 150 Atl. 575, [fol. 33] appears to be distinguishable in both factual and statutory situation, including that the statute imposes the tax only when the transfer is "made by a resident", and the transferor at the time of the execution of the trust deed was a resident of Illinois and only subsequently became domiciled in New Jersey; also, the trust deed contained no provision for the disposition of the corpus after the termina-

tion of life estates created by it, so that the remainder formed part of the decedent's estate at her death and as such was subject to the New Jersey Inheritance tax.

The representative of the Gibson estate relies largely upon the fact that the trust contract was made in New York with a New York trustee, claiming that as the contract is governed by and dependent for enforcement upon the laws of that State, it is beyond scope or control or disposition, distribution, and succession by the laws of Connecticut. However, as we view it, such resort as might possible be required to the New York laws for effectuation and performance of the contract would concern, only, "the accidental situation of some personal property which may require the aid of the laws of that State for its reduction to possession," or in some other respects, resembling in nature administration ancillary to that of the domicil. Hopkins' Appeal, supra, p. 653. Therefore, we hold this personalty trust to be subject to the Connecticut tax.

As we rule the transfers to be taxable, we are required to consider the further reserved questions—as of what date should the property be valued for the purposes of computing the tax, and is computation to be made upon the whole value of the property transferred, or upon the then present value of the life estate, or upon the then present value of the remainders? Our statute does not contain, as do some, express provision affording an answer, and there appears [fol. 34] to be a singular scarcity of reported cases involving analogous situations from which assistance may be derived. It was held in Blodgett v. Union & New Haven Trust Co., supra (p. 409), that the liability to taxation of a transfer effected by an irrevocable grant of a remainder interest depends upon the terms of the statute in effect at the time when the transfer takes place. Superficially, there is some plausibility in a contention that the value of the transfer, for the purpose of the tax, should be ascertained as of the same date, in which case the logical measure would be the deduction of the value of the reserved life estate from that of the corpus of the fund or other property which was the subject of the transfer. There are, however, considerations supporting valuation as of the date of possession and enjoyment which we regard as prevailing and determinative. The true value to the beneficiary does not

lie in the present right to the future possession or enjoyment of the trust fund or property—which is all that is vested—but in the consequences of his accession to actual possession and enjoyment and the resulting economic benefits. Therefore, it appears that the tax should be assessed upon the actual value which comes into the possession of the remainderman. In re Messerole's Estate, 162 N. Y. Supp. 414, 416; State v. Pabsts, 139 Wis. 561, 585, 121 N. W. 351; Reish v. Commonwealth, supra, p. 527; 14 Minn. Law Review, p. 616.

There is no inequity inherent in a postponement of the valuation, as well as assessment and payment of the tax, until the death of the grantor or settlor and accrual of possession in the remainderman; the latter would benefit thereby in instances in which values decreased between the transfer and the death, and it is not unfair that he be taxed upon any increase which occurred. Keeney v. New York, supra, p. 537. The tax commissioner also suggests, with [fol. 35] reason, that a tax on the present value of the remainder at date of transfer logically could be made payable immediately, and that in such case the interest on the tax to date of death would substantially equal the amount deducted as the value of the life estate. There is also the practical consideration that usually such transfers do not and cannot come to the attention of the taxing authorities until after the death of the transferor, and the difficulties incident to appraisal, then, of values as of a time long past are obvious. See Sec. 245a, Public Acts of 1931. On the whole, we conclude that the statute may and should be construed as contemplating that the basis upon which the tax is to be computed is the value of the property at the time when the remainderman becomes entitled to it in possession and enjoyment—the date of death of the transferor. Worcester County National Bank v. Commonwealth, supra, p. —, 175 N. E. p. 729; In re Fulham's Estate, 96 Vt. 308, 119 Atl. 433, 437.

We answer the questions propounded as follows: (1) to the first question in the Sewell, Bennett and Starr cases and the first and third questions in the Gibson case—that the property which was subject of transfer in each instance (in the Starr case one-half of the fund) passed by deed, grant, or gift intended to take effect in possession or en-

joyment at the death of the grantor or donor within the meaning of the Connecticut succession tax statute in force at the execution of the instrument of transfer; (2) to the second question in the Sewell, Bennett and Starr cases and the second and fourth questions in the Gibson case—that the imposition of such tax thereon transgresses no provision of the United States Constitution; (3) to the third question in the Sewell, Bennett and Starr cases and the fifth question in the Gibson case—that the property should be valued as of the date of the death of the decedent; and [fol. 36] (4) to the fourth question in the Sewell, Bennett and Starr cases and the sixth question in the Gibson case—that the tax should be computed on the valuation made as stated in the answer last preceding.

In this opinion the other judges concurred.

[fol. 37] In Supreme Court of Fairfield County

34860

Present: Hon. Frank P. McEvoy, Judge.

William H. Blodgett, Tax Commissioner of the State of Connecticut,

vs.

Appeal from Probate (Estate of Harriet D. Sewell)

Judgment—April 15, 1932

This appeal from the decree of the Probate Court for the district of Greenwich, passed on the 11th day of December, 1930, in decreeing that a certain transfer of property in trust made by the decedent, Harriet D. Sewell, by instrument executed December 28th, 1926, was not subject to the Connecticut succession tax, came to this court on the first Tuesday of February, 1931, when the appellant and The Guaranty Trust Company of New York, Executor of the estate of Harriet D. Sewell, late of Greenwich, deceased, appeared.

The court finds that due notice of the appeal was given by the appellant to The Guaranty Trust Company, Execu-

tor, as aforesaid, pursuant to an order of notice made by said Probate Court.

Said appellant having filed his reasons of appeal on February 7th, 1931, said action came thence to June 23rd, 1931, when the parties appeared and stipulated that said action be reserved for the advice of the Supreme Court of Errors on the following questions:

(1) Did the property which was the subject of transfer by the indenture dated December 28th, 1926, Exhibit A., [fol. 38] "pass by deed, grant or gift * * * intended to take effect in possession or enjoyment at the death of the grantor or donor", within the meaning of the Connecticut succession tax statute, in force at the date of the execution of said deed, or within the meaning of any subsequent amendment or revision of said succession tax statute?

(2) If said transfer is held to be taxable within the meaning of the applicable succession tax statute, would the imposition of such tax offend against Amendment XIV of the Constitution of the United States or against any other provision of said Constitution?

(3) If said transfer is held taxable, as of what date should the property be valued for the purpose of computing such tax?

(4) If said transfer is held taxable, is the tax to be computed upon the whole value of the property transferred, or upon the then present value of the reserved life estate, or, upon the then present value of the remainders?

The Supreme Court of Errors, on January 27th, 1932, rendered its judgment by answering said questions as follows:

(1) That the property which was subject of transfer passed by deed, grant, or gift intended to take effect in possession or enjoyment at the death of the grantor or donor within the meaning of the Connecticut succession tax statute in force at the execution of the instrument of transfer.

(2) That the imposition of such tax thereon transgresses no provision of the United States Constitution.

(3) That the property should be valued as of the date of the death of the decedent.

(4) That the tax should be computed on the valuation made as of the date of the death of the decedent.

[fol. 39] Said cause came thence to this Court at the present time when the parties appeared and were at issue, and were heard on appellant's motion for judgment in accordance with the advice of the Supreme Court of Errors. The court having heard the parties grants said motion.

Whereupon it is adjudged, pursuant to the advice of the Supreme Court of Errors, that the property which was subject of transfer passed by deed, grant, or gift, intended to take effect in possession or enjoyment at the death of the grantor or donor, within the meaning of the Connecticut succession tax statute in force at the execution of the instrument of transfer and that the property should be valued as of the date of the death of the decedent, and also that the tax should be computed on the valuation as of the date of the death of the decedent.

Ordered, adjudged, and decreed that the amount of the succession tax due to the State of Connecticut from said estate, computed according to the advice and direction of said Supreme Court of Errors is $21,951.33, and that the executors pay to the Treasurer of the State of Connecticut said sum of $21,951.33.

By the Court.

Michael J. Flanagan, Clerk. (Seal.)

[fol. 40] In Superior Court of Fairfield County

[Title omitted]

Order Allowing Appeal—June 22, 1932

Now comes the Guaranty Trust Company of New York, executor of the last Will and Testament of Harriet D. Sewell, deceased, stating that it is aggrieved by the decree of this court made on the 15th day of April, 1932, finding and deciding among other things that the property passing under a certain deed of trust made by the decedent

above named, executed on the 28th day of December, 1926, was a transfer intended to take effect in possession or enjoyment at the death of the grantor thereof, within the meaning of the Connecticut Succession Tax Statute in force at the execution of said transfer and as such was subject to the Connecticut Succession Tax, and moves an appeal from said decree to the Supreme Court of the United States, to be held at Washington, D. C., and has filed its petition, assignments of error and prayer for reversal pursuant to the statute and rulings of the Supreme Court of the United States in such case made and provided, and has offered a good and sufficient bond conditioned upon the payment of all costs in case it fails to make its said plea good, now therefore,

It is ordered, adjudged, and decreed that said appeal be and the same is hereby allowed and the said bond accepted and that notice of said appeal be given by some proper officer or indifferent person by mailing a true copy [fol. 41] thereof, and of said bond, and of this order, by registered mail, to the Attorney General of the State of Connecticut, and to the attorney for the State Tax Commissioner, within ten days from the date hereof; and it is further

Ordered that the Clerk of this Court shall prepare and certify a transcript of the record, proceedings and decree in this cause and transmit the same to the Supreme Court of the United States.

Alfred C. Baldwin, Judge.

[fol. 42] In Superior Court of Fairfield County

[Title omitted]

Petition for Leave to Appeal

To the Honorable Alfred C. Baldwin, Presiding Judge of the Superior Court of the State of Connecticut:

The Guaranty Trust Company of New York, as executor of the last Will and Testament of Harriet D. Sewell, deceased, in support of this petition, shows as follows:

1. Your petitioner is the executor of the last Will and Testament of Harriet D. Sewell, deceased.

2. That heretofore there was conducted within the State of Connecticut a statutory proceeding for the appraisal of the estate of said Harriet D. Sewell, deceased, and the determination of any inheritance tax which might be due thereon to the State of Connecticut upon the property of said decedent at the time of her death, and especially upon certain property transferred by the decedent by a certain deed of trust dated and delivered December 28, 1926. That a determination of said question was made by the Probate Court for the District of Greenwich and said Court on or about the 11th day of December, 1930 made an order and decree that the property passing under said deed of trust was not subject to the Connecticut Succession Tax and thereupon allowed and approved a computation of such tax upon other property left by the decedent in conformity to said decree.

3. That thereafter William H. Blodgett, Tax Commissioner of the State of Connecticut, on or about the 29th [fol. 43] day of December 1930 moved an appeal from said order and decree to the Superior Court held in and for the County of Fairfield, Connecticut, and said appeal was allowed by order of said Probate Court on or about the 30th day of December, 1930 and said William H. Blodgett, Tax Commissioner aforesaid, thereupon filed his reasons of appeal in the said Superior Court of Fairfield County.

4. That while said proceeding in the Superior Court is designated an appeal from the Court of Probate and the record of the proceedings in the Court of Probate is not brought up to the said Superior Court and is no part of the subsequent proceeding because the said Court of Probate is not a court of record and because on the appeal to the Superior Court, which is a court of general jurisdiction and is a court of record, the case is tried and considered de novo, and new evidence is taken and the first record made in the proceeding is that made in the Superior Court.

5. That thereafter by written stipulation between the parties, the parties agreed and requested the Superior Court that the cause should be reserved for the advice of the Supreme Court of Errors upon the statement of facts

and questions of law set forth in a certain stipulation between the parties, dated April 14, 1931, as thereafter amended by agreement undated but filed in the office of the Clerk of the Superior Court on June 19, 1931.

6. That thereafter by order of Judge Edwin C. Dickinson of said Superior Court, the said questions were reserved for the advice of the said Supreme Court of Errors as to what judgment, decree or decision should be made and rendered thereon by said Superior Court. That said stipulations and reservations were in accordance with the [fol. 44] practice in the State of Connecticut whereby a cause pending in the Superior Court, in which the parties are agreed upon the facts and the issues of law, may be heard in the first instance by the Supreme Court of Errors and said Supreme Court of Errors advised the Superior Court of the correct answers to the questions of law upon the stipulated facts and the judgment of the Superior Court is entered in accordance with said advice.

7. That the appeal of the said William H. Blodgett, Tax Commissioner as aforesaid, and the questions of law stated in said stipulation were argued in the Supreme Court of Errors and the said Court rendered its opinion and advice to the Superior Court thereon on or about the 27th day of January, 1932, and upon such opinion and advice and in conformity therewith, the Superior Court entered judgment on or about the 15th day of April, 1932, wherein and whereby it was among other things adjudged and decreed that the property passing under said deed of trust, dated December 28, 1926, was subject to the provisions of the Connecticut Succession Tax in force at the date of the execution of said deed and was held to be taxable within the meaning of the provisions of said statute. And furthermore, that the imposition of such tax thereon transgresses no provision of the United States Constitution.

8. That according to the practice in the State of Connecticut above set forth, the said judgment and decree so entered by the Superior Court, Fairfield County, upon the advice and opinion of the Supreme Court of Errors aforesaid is a final judgment or decree in a suit in the highest court of the State in which the decision could be had.

[fol. 45] 9. That the proceeding in which said judgment and decree was entered was one in which the validity of a

statute of the State of Connecticut was drawn in question on the ground that the said statute was repugnant to various provisions of the Constitution and laws of the United States and particularly to the Fourteenth Amendment to said Constitution, in that said Succession Tax Act, being Chapter 190 of the Laws of 1923, constituted the taking of property without due process of law in violation of the said Fourteenth Amendment to the Constitution of the United States and denied the equal protection of the laws, and that said statute of the State of Connecticut as so construed was invalid for such reasons in levying and providing for the collection of such tax.

10. That the opinion and advice of the Supreme Court of Errors and the judgment and decree of the Superior Court, Fairfield County, entered thereon were in favor of the validity of said state statute as so construed and of the succession tax attempted to be levied thereunder and overruled the objections made by your petitioner on the constitutional grounds as above set forth, and the determination of this constitutional question was necessary to the determination of the case and the judgment and decree entered was based thereon.

Wherefore your petitioner moves an appeal and does hereby appeal from said judgment of the Superior Court, Fairfield County, dated April 15, 1932, to the United States Supreme Court, to be held at Washington, D. C. and hereby gives a bond with sufficient surety to prosecute said appeal to effect.

Dated June 21st, 1932.

Guaranty Trust Company of New York, by W. C. Bloom, Assistant Trust Officer.

[fol. 46] *Duly sworn to by W. C. Bloom. Jurat omitted in printing.*

[fol. 47] In Superior Court of Fairfield County

[Title omitted]

Stipulation Waiving Notice, etc.

It is hereby stipulated that the application of the Guaranty Trust Company of New York, as executor of the last

Will and Testament of Harriet D. Sewell, deceased, for leave to appeal to the United States Supreme Court from the judgment of this Court in this cause entered on April 15, 1932, may be granted and notice of such application is hereby waived.

Dated June 18, 1932.

Wm. H. Blodgett, Tax Commissioner, by Farwell Knapp, Assistant Tax Commissioner, His Attorney.

[fol. 48] Citation, in usual form, omitted in printing.

[fol. 49] In Superior Court of Fairfield County

[Title omitted]

Assignments of Error

Now comes the petitioner herein, the Guaranty Trust Company, Executor of the last will and testament of Harriet D. Sewell, deceased, and shows that in acting upon the opinion and advice of the Supreme Court of Errors and in entering a judgment and decree in the above entitled cause in favor of respondent and against the petitioner, the Superior Court of Fairfield County erred in the following particulars:

First. In holding that the property which was the subject of transfer by the indenture dated December 28th, 1926, passed by deed, grant or gift intended to take effect in possession or enjoyment at the death of the grantor or donor.

Second. In failing to hold that the property which was subject of transfer by the indenture dated December 28th, 1926, passed absolutely as of the date of said transfer and not at the death of the grantor.

Third. In failing to hold that at the decedent's death she retained no interest in the property, the transfer of which was subject to the succession tax imposed by Chapter 190 of the Public Acts of 1923 of the State of Connecticut.

Fourth. In holding that the tax imposed by Chapter 190 of the Public Acts of 1923, as applied to the stipulated facts

in this cause, was valid and did not deprive petitioner of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

[fol. 50] Fifth. In holding that the tax imposed by Chapter 190 of the Public Acts of 1923, as applied to the stipulated facts in this cause, was valid and did not deny to petitioner and those claiming under it the equal protection of the laws within the meaning of the Fourteenth Amendment of the Constitution of the United States.

Sixth. In holding that the tax as imposed did not impair the obligation of a contract, to wit: the trust deed of December 28, 1926, within the meaning of Section 10 of Article I of the Constitution of the United States.

By reason whereof your petitioner has petitioned for leave to appeal and prays that said judgment and decree entered by the Superior Court of Fairfield County, Connecticut, be reversed as to the foregoing matters and that judgment be directed to be entered in favor of your petitioner, and for costs.

Dated June 22, 1932.

Guaranty Trust Company of New York, Executor of Last Will and Testament of Harriet D. Sewell, Deceased, by Hill, Lockwood & Redfield, Attorneys for Appellant.

Allowed June 22, 1932.

Alfred C. Baldwin, Judge

[fol. 51] In Superior Court of Fairfield County

[Title omitted]

Certificate of Chief Justice of Supreme Court of Errors

I, the undersigned, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut, do hereby certify unto Honorable Supreme Court of the United States that in deciding the question as to whether the tax imposed by Chapter 190 of the Public Acts of 1923 was contrary to the Fourteenth Amendment or to any other provision of the Federal Constitution, the Court considered the due process and equal

protection clauses of the Fourteenth Amendment to the Constitution and also the contract clause under the Tenth Section of the First Amendment of said Constitution, and that the decision in said case and the judgment entered thereon on the advice and opinion of the Supreme Court of Errors was in favor of the validity of Chapter 190 of the Public Acts of 1923 and not in violation of either of said Amendments to the Constitution.

I do further certify that according to the practice in the State of Connecticut the said judgment rendered in the Superior Court of the State of Connecticut for the County of Fairfield on April 15, 1932 upon the advice and opinion of the Supreme Court of Errors is a final judgment and decree of the highest court of the State of Connecticut in [fol. 52] which a decision in the suit could be had.

It is hereby directed that this certificate be filed in the office of the Clerk of said Superior Court and shall form a part of the record to be certified by said Clerk to the Supreme Court of the United States upon the appellant's appeal herein.

Dated June 22, 1932.

Wm. M. Maltbie, Chief Justice.

[fol. 53] In Superior Court of Fairfield County

[Title omitted]

Stipulation Respecting Transcript of Record

It is hereby stipulated by and between the attorneys for the parties in the above entitled action that the papers to be transmitted to the Supreme Court of the United States by the Clerk of the Superior Court of the State of Connecticut, Fairfield County, pursuant to an order of said Superior Court dated and issued on June 22, 1932, are the following, and that this stipulation shall take the place of the præcipe required to be filed by counsel for the respective parties under and pursuant to Rule Ten of the Rules of the Supreme Court of the United States:

1. The printed record used in the Supreme Court of Errors on the reservation of the above case.
2. The opinion of the Supreme Court of Errors.
3. The rescript of the said Supreme Court answering the questions propounded in said reservation.

4. The judgment entered by the Superior Court on April 15, 1932 in conformity to the advice and opinion of the Supreme Court of Errors.

5. The petition and order for leave to appeal and consent thereto, the assignments of error, bond and certificate by the Honorable William M. Maltbie, dated June 22, 1932 [fol. 54] and filed with the Clerk of this Court on June 22, 1932.

6. The citation to the respondent, William H. Blodgett, Tax Commissioner, dated June 22, 1932, with proof of service of same on said respondent and his attorney, filed with the Clerk of this Court.

7. The present stipulation.

It is further stipulated that the papers annexed hereto are true and correct copies of the papers described in paragraphs 1 to 7 inclusive of this stipulation. That with this stipulation they constitute the complete transcript of the record to be certified to the Supreme Court of the United States at Washington, and that the Clerk of the Superior Court of the State of Connecticut for Fairfield County may certify this transcript of record and other papers without further formality.

Dated June 23rd 1932.

Hill, Lockwood & Redfield, Attys. for Applt. Farwell Knapp, Atty. for Tax Commissioner. Warren B. Burrows, Attorney General of the State of Connecticut.

[fols. 55 & 56] Bond on appeal for $250.00 omitted in printing.

[fol. 57] In Superior Court of Fairfield County

[Title omitted]

Admission of Service

Due service of a copy of the citation and bond on appeal in the above entitled proceeding, dated June 22nd, 1932, is hereby admitted.

Dated June 27th, 1932.

Farwell Knapp, Attorney for the State Tax Commissioner.

[fol. 58] IN SUPERIOR COURT OF FAIRFIELD COUNTY

[Title omitted]

ADMISSION OF SERVICE

Due service of a copy of the citation and bond on appeal in the above entitled proceeding, dated June 22nd, 1932, is hereby admitted.

Dated June 30th, 1932.

Warren B. Burrows, Attorney General of the State of Connecticut.

[fol. 59] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 60 & 61] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 12, 1932

Comes now the appellant in the above entitled cause and adopts its assignments of error as its statement of the points to be relied upon in the argument in this Court.

Appellant further represents that the whole record, as filed, is necessary for the consideration of the case.

Gregory Hankin, Gregory Hankin, Counsel for Appellant.

[fol. 62] [File endorsement omitted.]

Endorsed on cover: File No. 36,914. Connecticut Superior Court, Fairfield County. Term No. 217. The Guaranty Trust Company of New York, as executor of the last will and testament of Harriet D. Sewell, deceased, appellant, vs. William H. Blodgett, Tax Commissioner. Filed July 12, 1932. File No. 36,914.

FILE COPY

FILED
AUG 4
CHARLES ELMORE

No. 217

In The

Supreme Court of the United States

October Term, 1932.

Guaranty Trust Company, Executor, Etc.,
Appellant,

vs.

William H. Blodgett, Tax Commissioner,
Appellee.

Appeal from the Superior Court of Fairfield County, Connecticut.

STATEMENT AS TO JURISDICTION.

R. L. Redfield,
Hill, Lockwood & Redfield,
Attorneys for Appellant.

Gregory Hankin,
Washington, D. C.,
Of Counsel.

The Daily Record Co. Print, Baltimore

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 217.

GUARANTY TRUST COMPANY, EXECUTOR, ETC.,
Appellant,

vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER,
Appellee.

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 (1) of the Rules of this Court, appellant submits this statement showing that the appeal in the above entitled cause is properly before this Court.

OPINIONS BELOW.

The opinion of the Supreme Court of Errors of the State of Connecticut (R. 19),* upon the questions of law reserved to it by the Superior Court for Fairfield County (R. 16), is reported in 114 Conn. 207 and 158 Atl. 245. No opinion was delivered by the Superior Court.

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* Pages refer to the unprinted record.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928.

(1)

APPEAL TIMELY TAKEN.

The order from which this appeal is taken was entered on April 15th, 1932 (R. 37). A petition for appeal (R. 42) accompanied by assignments of error (R. 49) was on June 22, 1932, presented to Hon. Alfred C. Baldwin, Presiding Judge of the Superior Court of Fairfield County, Conn., and the appeal was by him allowed on the same day (R. 40). Citation of appeal with service acknowledged was filed on June 22, 1932 (R. 48), and the case was docketed in this Court on July 12, 1932.

(2)

FINALITY OF JUDGMENT.

The judgment (R. 37) forming the basis of the appeal is a final judgment in the sense that an affirmance of it would leave nothing to be done by the court below but to execute the judgment already rendered.

Bostwick v. Brinkerhoff, 106 U. S. 3.
Georgia Ry. Co. v. Decatur, 262 U. S. 432, 437.
Blodgett v. Silberman, 277 U. S. 1, 6.

The judgment is for a specific amount and is on its face final in form as well as in substance, and disposes of all elements of the controversy.

Mower v. Fletcher, 114 U. S. 127.
Carondelet Canal Co. v. La., 233 U. S. 362, 371, 373.
Haseltine v. Cent. Bank of Springfield, 183 U. S. 130, 131.

(3)

JUDGMENT OF THE HIGHEST COURT.

The judgment of the Superior Court is that of the highest court in which, under the laws of the state, such judgment could be had. In this case the questions of law were reserved to the Supreme Court of Errors. Then the Superior Court, following the advice of the Supreme Court of Errors, entered a judgment giving full effect to the rulings of the higher court. Under such circumstances, no further appeal may be had to the Supreme Court of Errors or to any other court in the state.

See *Certificate of the Chief Justice of the Supreme Court of Errors* (R. 51).

There being no further right of appeal,

Salomon v. Tax Commission, 278 U. S. 484, 486,

Myers v. International Trust Co., 273 U. S. 380, 381,

nor any discretionary review in a higher court,

Virginia Ry. Co. v. Mullens, 271 U. S. 220, 222,

the appeal herein is taken from "a highest court of a state in which a decision in the suit could be had."

(4)

VALIDITY OF A STATE STATUTE DRAWN INTO QUESTION AND DECISION IN FAVOR OF ITS VALIDITY.

In this suit appellant contended in the courts below that a state statute, as applied, was repugnant to the Constitution of the United States, and the decision was in favor of its validity.

(a) *The Statute.*

The statute whose validity was drawn into question is Chapter 190, Sec. 1 of the Connecticut Public Acts of 1923, which provides:

> "*All property and any interest therein owned by a resident of this state at the time of his decease,* * * * which shall pass by will or inheritance under the laws of this state; and all gifts of *such* property by deed, grant or other conveyance, made in contemplation of death of the grantor or donor, or intended to take effect in possession or enjoyment at or after the death of such grantor or donor, shall be subject to the tax herein prescribed.' (Italics supplied.)

Indirectly there is also drawn into question the validity of a subsequent amendment of this statute, being Sections 1 and 2, Chapter 299, Public Acts of 1929 (See p. 10, *infra*).

(b) *Application of the Statute or Nature of the Case.*

The validity of the above statute is questioned as applied to the following facts, stated by the Supreme Court of Errors (R. 20):

> "Harriet D. Sewell died on May 20, 1930, domiciled in Greenwich. On December 28, 1926, she executed an irrevocable deed of trust to a New York trust company of certain securities therein described in which deed it was provided that the trustee collect the income and pay it to Mrs. Sewell during her life; upon her death the income was to be paid to her husband during his life, and upon his death the trustee was directed to pay and transfer the principal of the trust absolutely to their daughter, if she survived, but if not, then to the issue of the daughter, with a gift over in default of such issue."

The stipulation of facts filed in the court below contained a provision that *this transfer was not made in contemplation of death* (R. 4).

On the question whether the succession tax was applicable to this transfer, the Probate Court held in the negative. The Tax Commissioner appealed to the Superior Court which, upon advice received from the Supreme Court of Errors, held (i) that the property which was the subject of the transfer, passed by deed, grant, or gift, intended to take effect in possession or enjoyment at the death of the grantor or donor within the meaning of the Connecticut Succession Tax Statute in force at the execution of the instrument of transfer; (ii) that the imposition of such tax thereon transgressed no provision of the United States Constitution; (iii) that the property should be valued as of the date of the death of the decedent; and (iv) that the tax should be computed on such valuation (R. 38).

(c) *Constitutional Question Timely Raised.*

The validity of the above statute was first drawn into question by a "stipulation of questions of law" (R. 16) of which the second question reads as follows:

> "If said transfer is held to be taxable within the meaning of the applicable succession tax statute, would the imposition of such tax offend against Amendment XIV of the Constitution of the United States or against any other provision of said Constitution?"

The federal question was thus timely raised in the court below, although, for the purposes of the jurisdiction of this Court in this case, it is immaterial whether the constitutional question was actually raised, since it

was expressly decided by the state court, and was therefore "drawn into question."

Home Insurance Co. v. Dick, 281 U. S. 397, 407.
Silver v. Silver, 280 U. S. 117, 122.
Mallinckrodt Works v. St. Louis, 238 U. S. 41, 49.

(d) *Constitutional Question Sufficiently Raised.*

The above constitutional question was raised in general terms without specifying the particular clauses in the 14th Amendment or in the other provisions of the federal Constitution. Appellant is aware of the cases in which it had been intimated by this Court that a general reference to the 14th Amendment may not be sufficient.

Clarke v. McDade, 165 U. S. 168, 172-3;
Marvin v. Trout, 199 U. S. 212, 223-5;
Hiawassee Power Co. v. Carolina-Tenn. Co., 252 U. S. 341, 343.

But in such cases the doubt as to whether the constitutional question had been raised with sufficient particularity is dispelled, if the state court expressly passes on the constitutional question.

However, since in the present case the Supreme Court of Errors ruled on the constitutional question in the same general terms as used by the question itself (R. 30), appellant obtained from the Supreme Court of Errors a Certificate (R. 51) showing that under the phrase "does not transgress the 14th Amendment" the Court considered both the due process clause and the equal protection clause of the 14th Amendment; and under the phrase

"any other provision" the Court considered the contract clause of Article I, Section 10 of the Constitution.

Whitney v. Calif., 274 U. S. 357, 360-2;
Capital City Dairy Co. v. Ohio, 183 U. S. 238, 244;
Armstrong v. Treasurer, 16 Pet. 281, 285, 286;

(5)

EXTENT OF THIS COURT'S JURISDICTION.

We have assigned as error (R. 49-50) the ruling of the court below that the tax as applied did not transgress the due process, equal protection and contract clauses of the Constitution.

(a) *Application of the Statutes Without Due Process.*

This Court has jurisdiction on appeal to determine whether a state statute, not invalid on its face, is unconstitutionally applied.

Fiske v. Kansas, 274 U. S. 380, 385;
Panhandle Oil Co. v. Knox, 277 U. S. 218, 222;
Quaker Cab Co. v. Pennsylvania, 277 U. S. 389, 401.

In this case, appellant is not contending that the state may not, consistently with the due process clause, impose a tax on the transfer of or succession to property intended to take effect at or after the death of the donor. Appellant's contention is that the state may not, consistently with the due process clause, impose a tax on a transfer of property which had vested absolutely in the donee or transferee before the death of the donor, under the guise of taxing a transfer intended to take effect at or after death. Appellant contends that the decedent, at

the time of her death, retained no interest in the property on the transfer of which a succession tax could be imposed,

May v. Heiner, 281 U. S. 238

and that the transfer was not one intended to take effect in possession or enjoyment at or after the death of the transferor.

Coolidge v. Long, 282 U. S. 582.

While the decision of the court below on the construction of the statute is entitled to great weight, its ruling on the operation and effect of the statute is not conclusive upon this court in determining whether through such construction the state violated a right under the Federal Constitution.

Coolidge v. Long, 282 U. S. 582, 597;
N. J. Bell Tel. Co. v. Tax Bd., 280 U. S. 338, 346-347.

It is apparent from the opinion that the court below conceded that a succession tax could not be imposed on a transfer which is absolute at the time made. But in order to apply the tax, the court below held that the transaction was one in which the possession or enjoyment was intended to take effect at or after the death of the donor. This Court has jurisdiction on appeal to determine whether such interpretation of the transaction was correct, in order to determine whether appellant's constitutional rights have been violated.

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290.

(b) *Denial of Equal Protection.*

Appellant concedes that the state is not precluded from imposing a tax, by whatever name, on this type of trans-

fer *inter vivos*, provided a substantially similar tax is imposed on the other gifts *inter vivos* in the same or in other statutes.

Gregg Dyeing Co. v. Query, 286 U. S. —; 76 Law. Ed. 852, 856; 52 Sup. Ct. 631, 634;
Continental Baking Co. v. Woodring, 286 U. S. —; 76 Law. Ed. 816, 824; 52 Sup. Ct. 595, 601.

But the state of Connecticut imposes no tax on gifts *inter vivos*, and the imposition of the tax on this class of gifts alone, has no rational basis in classification. The tax is therefore violative of the equal protection clause of the 14th Amendment, especially since, as was stipulated, the transfer was not made in contemplation of death.

Schlesinger v. Wisconsin, 270 U. S. 230, 240;

Compare also

Heiner v. Donnan, 285 U. S. 312, 328.

(c) *Impairment of Contract.*

The instrument whereby the property in question was transferred (R. 5-8) constituted a contract between Mrs. Sewell and the Guaranty Trust Co., and the rights of the parties in the property were determined as of the date of that contract. Appellant contends that under that contract Mrs. Sewell retained no interest in the property except income for life, and at her death there was no interest at all on the transfer of which the succession tax could be imposed. The court below, in upholding this succession tax, *measured by the decedent's interest in the property at the time of her death*, so interpreted the contract as to vary the rights of the contracting parties.

The first question reserved for the advice of the Supreme Court of Errors was whether the transfer in question was intended to take effect in possession or enjoyment at or after the death of the grantor within the meaning of the Connecticut succession tax statute in force at the date of the execution of the deed of trust, or within the meaning of any subsequent amendment or revision of said succession tax statute (R. 16). That court held that the transfer was intended to take effect at the death of the grantor within the meaning of the statute in force at the execution of the instrument of transfer (R. 35), and judgment was entered accordingly. In effect, however, the Supreme Court of Errors made no distinction (R. 23) between the Act of 1923, in force at the execution of the transfer, and the subsequent amendment of 1929 (Pub. Acts 1929, Ch. 299, Secs. 1 and 2; Gen. St. (1930), Ch. 77, Secs. 1360, 1361). The pertinent provisions of this amendment are as follows:

> "*Sec. 1360. Tax on Transfers of Property.* A tax is imposed, * * * upon transfers, in trust or otherwise, of the following property or any interest theerin or income therefrom: (a) When the transfer is from a resident of this state; * * *
>
> "*Sec. 1361. Transfers, When Taxable.* The transfers enumerated in Section 1360 shall be taxable if made: * * * (d) by gift or grant intended to take effect in possession or enjoyment at or after the death of the transferor. A transfer of property in respect of which the transferor reserves to himself a life income or interest shall be construed prima facie to have been intended to take effect in possession or enjoyment at death; * * * "

Although the Supreme Court of Errors stated in its opinion that the transfer in this case involved no retrospective operation of the law (R. 23), its opinion and

judgment are sustainable only under the 1929 Amendment of the taxing statute. In other words, appellant maintains, while interpreting a prior statute, the court below really gave effect to a later taxing statute, contrary to the contract clause of Art. I, Sec. 10 of the Federal Constitution.

> "In deciding this question, this court is not limited to the mere consideration of the language of the opinion of the state court, but will consider the substance and effect of the decision, and will for itself determine what effect, if any, was given by it to the repealing (in this case—amending) act."—*Long Sault Development Co. v. Call*, 242 U. S. 272, 277.

See also:

Louisiana Ry. & Nav. Co. v. New Orleans, 235 U. S. 164, 171;
McCullough v. Virginia, 172 U. S. 102, 116-7;
Hubert v. New Orleans, 215 U. S. 170, 175;
Carondelet Canal Co. v. Louisiana, 233 U. S. 362, 376.

(d) *Interpretation of the Contract.*

This invasion of appellant's rights under the contract clause brings within the scope of this Court's jurisdiction an independent consideration of the nature of the transfer, namely, whether it was intended to take effect at or after the death of the grantor.

Coolidge v. Long, 282 U. S. 582, 597;
Larson v. South Dakota, 278 U. S. 429, 433;
Applebee v. City of New York, 271 U. S. 364, 380.

Assuming, however, that the state court gave no effect to the later statute, that the state did not *pass a law* impairing the obligations of contract, within the meaning of Art. 1, Sec. 10, and the interpretation of the statute is presumed to be the interpretation as of the time of its enactment,

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 451

still, when a state court so interprets a contract, varying the obligations thereunder, that, had the decision been enacted into law, it would have been contrary to the contract clause, and the judgment is assailed under the due process clause, this court, in passing on the constitutional claim, will not be bound by the state court's interpretation of the contract, but will follow its own interpretation.

Coolidge v. Long, 282 U. S. 582, 597.

In that case Mr. Justice Butler stated the rule more broadly:

> "It is well understood that, when the jurisdiction of this court is invoked to determine whether a state law impairs the rights of the litigant under a prior contract, or whether the State is depriving him of his property without due process of law in violation of the Fourteenth Amendment and the question turns upon the existence or terms of a contract, this court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. That rule is necessary in order that this court may properly enforce these provisions of the Constitution."

In other words, the rule as to interpretation of a contract, lying at the basis of a claim under the due process clause, is the same as is applicable to a contract lying at the basis of a claim under the contract clause.

The rule as stated by Mr. Justice Butler is a corollary of the *ratio decidendi* at the basis of this Court's jurisdiction in such cases as

Eureka Pipe Line Co. v. Hallahan, 257 U. S. 265, 270;
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290.

The rule may be generalized thus: *Where it is claimed that a state statute, as applied to a given transaction, violates a right guaranteed by the Constitution, and the state court, conceding that such application of the statute would be unconstitutional, nevertheless holds the statute applicable by interpreting the transaction to be otherwise than claimed, this Court, on appeal from such decision, will follow its own interpretation of the transaction in determining whether the appellant's constitutional rights have been violated.* In this respect it is immaterial what is the type of transaction, and what provision of the Constitution is invoked.

The facts in this case are not in dispute, and from the decision of the court below it may be assumed that, had it considered the transfer in question as not having been made to take effect at or after the death of the grantor, it would have held a succession tax on such transfer violative of the *due process clause* and a gift tax on such transfer violative of the *equal protection clause*. Having held the tax applicable, the mistake, if any, of the court below is *at least* in the interpretation of the transfer. Appellant submits, therefore, that whether its constitutional claim rests on the due process clause or on the equal protection clause, this Court's jurisdiction extends to an independent interpretation of the transfer in question.

Wherefore it is respectfully submitted that the appeal in the above entitled cause comes within the proper jurisdiction of this Court.

Dated 5th day of August, 1932.

R. L. REDFIELD,

HILL, LOCKWOOD & REDFIELD,

Attorneys for Appellant.

GREGORY HANKIN,

Washington, D. C.,

Of Counsel.

FILE COPY

No. 217

SEP
CHARLES

In The

Supreme Court of the United States

October Term, 1932.

Guaranty Trust Company, Executor, Etc.,
Appellant,

vs.

William H. Blodgett, Tax Commissioner,
Appellee.

Appeal from the Superior Court of Fairfield County, Connecticut.

APPELLANT'S ANSWER TO APPELLEE'S MOTION TO AFFIRM.

R. L. Redfield,
Hill, Lockwood & Redfield,
Attorneys for Appellant.

Gregory Hankin,
Washington, D. C.,
Of Counsel.

The Daily Record Co. Print, Baltimore

In The

Supreme Court of the United States

October Term, 1932.

No. 217.

Guaranty Trust Company, Executor, Etc.,
Appellant,

vs.

William H. Blodgett, Tax Commissioner,
Appellee.

Appeal from the Superior Court of Fairfield County, Connecticut.

APPELLANT'S ANSWER TO APPELLEE'S MOTION TO AFFIRM.

Appellee filed a motion to affirm the judgment of the court below, without giving appellant an opportunity to be heard, on the ground that the questions on which the decision of the cause depends are "so unsubstantial as not to need further argument." In support of this motion appellee argues (1) that no question can arise as to the meaning and construction of the taxing statute, and (2) that it has already been decided by this Court that a state has power to tax such a transfer as this prospectively.

In the Jurisdictional Statement filed under Rule 12(1), appellant has taken special care to show that the federal questions involved in the case were substantial (pp. 7-13 of the Jurisdictional Statement).

I.

SUBSTANTIAL FEDERAL QUESTIONS RAISED IN THIS CASE.

1. Appellant contends that although the Supreme Court of Errors of Connecticut has expressly held that there was no retroactive application of any statute, and that the transfer was taxable under the 1923 Statute which was in force at the time of the transfer, it actually gave effect to the 1929 Statute, enacted after the transfer. Appellant will show, furthermore, that while the tax might be sustainable under the later statute, it can not be sustained under the earlier statute. Upon a showing of this fact a substantial federal question immediately appears under the contract clause of the Constitution.

2. Appellant also maintains that the retroactive application of the 1929 Statute results in a denial of due process, under the authority of *Coolidge v. Long*, 282 U. S. 582.

3. Assuming that the court below gave no retroactive effect to the 1929 Statute, but actually applied the 1923 Statute, appellant maintains that the tax in question was contrary to the due process clause, because the state undertook to impose a death duty upon a transfer which was not in effect a testamentary disposition. That presents a substantial federal question, whether, under the decisions of this Court in *Coolidge v. Long*, 282 U. S. 582, and *Heiner v. Donnan*, 285 U. S. 312, an irrevocable trust, *not made in contemplation of death*, can be taxed as a testamentary disposition.

4. In view of the strained construction by the court below, that the tax was imposed not upon the succession to the property upon the death of the decedent, but upon *the succession to the possession or enjoyment of the property,* appellant will show in its main brief that the operation and effect of such construction is to render the tax in question not a succession tax, but a gift tax, and as such is contrary to the equal protection clause of the 14th Amendment.

These are the main federal questions in the case. They cannot be regarded as unsubstantial.

II.

MEANING OR CONSTRUCTION VS. OPERATION AND EFFECT.

Appellee maintains that no question can arise as to the meaning and construction of the taxing statute. Appellant agrees entirely with this proposition of law. Appellant is not questioning the correctness of the interpretation of the statute. It says, however, that accepting that construction, the *operation and effect* of the statute is such as to deprive appellant of its constitutional rights (See p. 8 of the Jurisdictional Statement).

It is interesting to note that appellee in the first sentence under that argument (p. 3 of the Motion) confuses "meaning or construction" with "effect and operation."

Appellee says:

> "The court below held that the legislature intended by the words used in the statute, to tax such a transfer as the one in the case at bar."

Appellant maintains that whatever may have been the intent of the legislature in its use of the words of the

statute, the application of the statute operates contrary to the due process and equal protection clauses of the 14th Amendment.

III.

THE VALIDITY OF THE TAX HAS NOT BEEN DETERMINED BY THIS COURT, CERTAINLY NOT IN FAVOR OF THE APPELLEE.

Appellee further states that the power to impose such tax has been recognized by this Court, and cites the cases of

Coolidge v. *Long*, 282 U. S. 582
Nickel v. *Cole*, 256 U. S. 222
Keeney v. *New York*, 222 U. S. 525.

None of these cases supports appellee's contention.

1. *Coolidge* v. *Long* did not involve "the same statutory phrase as here in question" (p. 4 of the Motion). There the statute provided for a tax on

> "All property within the jurisdiction of the commonwealth * * * which shall pass by * * * deed, grant or gift, * * * made or intended to take effect in possession or enjoyment after his [grantor's] death * * * to any person, absolutely or in trust, * * *." (282 U. S. 582, 595).

The wording of that statute is equivalent to the Connecticut Statute of 1929 (p. 10 of the Jurisdictional Statement), but not to the Connecticut Statute of 1923, which imposed a tax measured by "all property and any interest therein owned by a resident of this state at the time of his decease, * * *."

Furthermore, the sentence quoted from Mr. Justice BUTLER's opinion must be read in conjunction with the preceding sentence. The phrase that "the state has

power to lay *such* an excise upon properties *so* passing" refers to the phrase in the preceding sentence, "upon property of the deceased transferred at his death." If the sentence quoted is read in connection with the preceding sentence, it becomes evident that it does not cover the present case, for here the property in question was not transferred at the decedent's death.

Finally, even if the sentence quoted did cover the present situation, still the case of *Coolidge* v. *Long* held the tax unconstitutional. The statement that the state had power to impose *such* tax *after* the taking effect of the taxing act was not necessary for the decision and must therefore be considered mere *dictum*. It is interesting to note that appellee in his brief in the Supreme Court of Errors, after discussing the facts of *Coolidge* v. *Long*, said:

> "No more comment is required, except to point out two sentences from the majority opinion, which, if not *obiter*, we respectfully submit are decisive of the questions now before this Court."

And then appellee quoted the two sentences.

2. In *Nickel* v. *Cole*, 256 U. S. 222, there was clearly a disposition testamentary in character. There, one Miller made a will and at the same time a deed of trust conveying certain property in trust to himself for life and after his death upon limitations similar to those in his will—any payment under the will to be in satisfaction of the provisions both in the will and in the deed. It is true the deed contained no power of revocation, but its effect could be nullified at any time by a provision in the will for payments equal to the properties conveyed in trust. The State Court held that the execution of the deed and will was one transaction and gave no vested right until there was death (p. 225). The transfer was

testamentary because it was in effect made by the will and also because the deed was revocable by the will, and was therefore a transfer which took effect at the death of the grantor.

3. In *Keeney* v. *New York*, 222 U. S. 525, the decedent had executed a deed conveying certain stocks and bonds to a trust company in trust to hold the same during the life of the trustor and to divide the net income equally between herself and her three children, with the further provision that after her death the trustees should pay the entire income, or transfer the property, to her children. In the deed she *reserved the right to revoke or alter the whole or any part of the trust conveyance, at any time after six months notice in writing.* We think nothing further need be said about this case, except that the appellee knew the trust was revocable. In his brief in the Supreme Court of Errors the appellee said:

> "• • • an examination of the record shows that the trust there was revocable although neither the New York Court of Appeals nor the United States Supreme Court so much as mention that fact in their opinions."

That fact was brought out in this Court's statement of facts (p. 526).

Assuming that the cases relied on by the appellee do support his view, there would arise so many inconsistencies between those cases and later decisions (compare for example *Nickel* v. *Cole* with *Untermeyer* v. *Anderson*, 276 U. S. 440, as to the effective date of the statute, and *Keeney* v. *New York* with *Coolidge* v. *Long*, as to the effect of the irrevocable trust) that the questions involved in this case could not be considered unsubstantial. The mere fact that a question of law had already been

passed on by this Court does not render it unsubstantial in determining the right to appeal.

Farmers Loan & Trust Co. v. *Minn.*, 280 U. S. 204
Baldwin v. *Mo.*, 281 U. S. 586
Fox Film Corp. v. *Doyal*, 286 U. S. 123.

Appellant submits that appellee's motion to affirm the judgment below without hearing the appellant should be denied, or that consideration of the motion be postponed until the hearing of the case on the merits.

Respectfully submitted,

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No. 217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

GUARANTY TRUST COMPANY, EXECUTOR, ETC.,
Appellant,

vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER,
Appellee.

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

BRIEF FOR APPELLANT.

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In The

Supreme Court of the United States

October Term, 1932.

No. 217.

Guaranty Trust Company, Executor, Etc.,
Appellant,

vs.

William H. Blodgett, Tax Commissioner,
Appellee.

Appeal from the Superior Court of Fairfield County, Connecticut.

BRIEF FOR APPELLANT.

This is an appeal from a judgment rendered by the Superior Court of Fairfield County, Connecticut (R. 37), upon advice received from the Supreme Court of Errors (R. 22).

Opinions Below.

The opinion of the Supreme Court of Errors of the State of Connecticut (R. 24), upon the questions of law reserved to it by the Superior Court of Fairfield County (R. 21), is reported in 114 Conn. 207 and 158 Atl. 245. No opinion was delivered by the Superior Court.

Jurisdiction.

Pursuant to Rule 12 (1) of the Rules of this Court, appellant submitted a statement showing that the appeal herein was timely taken, that the judgment from which this appeal was prosecuted was final and rendered by the highest court in which a judgment in the suit could be had, that there was drawn into question the validity of a state statute, and that the decision was in favor of its validity. Appellant also showed that the constitutional questions involved in this appeal were timely and sufficiently raised in the courts below, and that the jurisdiction of this court extends to a determination of the nature of the transaction as well as the validity of the statute, as applied, under the Federal Constitution. On the 10th day of October, 1932, this Court rendered an order noting probable jurisdiction in this cause.

Statutes.

The state statute whose validity, as applied, is drawn into question is Section 1, Chapter 190, Connecticut Public Acts of 1923, which provides as follows:

> "*All property and any interest therein owned by a resident of this state at the time of his decease,* * * * which shall pass by will or inheritance under the laws of this state; and all gifts of *such* property by deed, grant or other conveyance, made in contemplation of death of the grantor or donor, or intended to take effect in possession or enjoyment at or after the death of such grantor or donor, shall be subject to the tax herein prescribed." (Italics supplied).

Appellant claims that while interpreting and applying the above statute and while expressly holding that it was applicable to the present case, the court below really gave effect to a later amendment to the above statute, to wit:

Sections 1 and 2, Chapter 299, Public Acts of 1929 (Gen. Stat. 1930, Secs. 1360 and 1361), which provides:

> "**Sec. 1360. Tax on Transfers of Property.** A tax is imposed, * * * upon transfers, in trust or otherwise, of the following property or any interest therein or income therefrom: (a) When the transfer is from a resident of this state; * * * (enumerating types of transfers).
>
> "**Sec. 1361. Transfers, when taxable.** The transfers enumerated in Section 1360 shall be taxable if made: * * * (d) by gift or grant intended to take effect in possession or enjoyment at or after the death of the transferor. A transfer of property in respect of which the transferor reserves to himself a life income or interest shall be construed prima facie to have been intended to take effect in possession or enjoyment at death; * * *."

The validity of this amendment, as applied, is likewise drawn into question in the present case.

Statement of Facts.

The facts of the case are succinctly stated by the Supreme Court of Errors as follows (R. 24):

> "Harriet D. Sewell died on May 20, 1930, domiciled in Greenwich. On December 28, 1926, she executed an irrevocable deed of trust to a New York trust company of certain securities therein described, in which deed it was provided that the trustee collect the income and pay it to Mrs. Sewell during her life; upon her death the income was to be paid to her husband during his life, and upon his death the trustee was directed to pay and transfer the principal of the trust absolutely to their daughter, if she survived; but if not, then to the issue of the daughter, with a gift over in default of such issue."

After Mrs. Sewell's death, appellant, as executor, filed a copy of the trust deed, and a list of the securities trans-

ferred, with the Probate Court for the District of Greenwich. The Tax Commissioner contested appellant's claim that the trust property transferred under the deed was not subject to the Connecticut succession tax, and on December 11, 1930, the Probate Court rendered a decree that the property forming this trust was not subject to the tax.

The Commissioner appealed to the Superior Court of Fairfield County, where the above facts were stipulated, and, in addition, "*that said transfer was not made by the decedent in contemplation of death*" (R. 3). Appellant and appellee also filed a "stipulation of questions of law" (R. 21), with a request that these questions be reserved for the advice of the Supreme Court of Errors. The questions were so reserved (R. 22), and the Supreme Court of Errors rendered an opinion and order (R. 22-37), holding (i) that the property which was the subject of the transfer passed by deed, grant or gift intended to take effect in possession or enjoyment at the death of the grantor or donor within the meaning of the Connecticut succession tax statute in force at the execution of the instrument of transfer; (ii) that the imposition of such tax thereon transgressed no provision of the United States Constitution, meaning thereby the due process and equal protection clauses of the 14th Amendment and the contract clause of Article 1, Section 10 (R. 45); (iii) that the entire property should be valued as of the date of the death of the decedent, and (iv) that the tax should be computed on such valuation.

The Superior Court of Fairfield County then entered a judgment giving full effect to the advice of the Supreme Court of Errors. From this judgment appellant appealed to this Court.

Assignment of Errors.

Appellant contends that in so deciding this case, the Court below erred in the following particulars:

1. In holding that the property which was the subject of transfer by the indenture dated December 28th, 1926, passed by deed, grant or gift intended to take effect in possession or enjoyment at the death of the grantor or donor.

2. In failing to hold that the property in question passed absolutely as of the date of said transfer and not at the death of the grantor.

3. In failing to hold that at the decedent's death she retained no interest in the property, the transfer of which was subject to the succession tax imposed by Chapter 190 of the Connecticut Public Acts of 1923.

4. In holding that the tax, as applied to the stipulated facts in this cause, was valid and did not deprive appellant of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

5. In holding that the tax, as applied to the stipulated facts in this cause, was valid and did not deny to appellant and those claiming under it the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States.

6. In holding that the tax, as imposed, did not impair the obligations of a contract, to wit: the trust deed of Dec. 28, 1926, contrary to Article I, Section 10 of the Constitution of the United States.

SUMMARY OF ARGUMENT.

I. The court below erred in holding that the transfer in question was intended to take effect in possession or enjoyment at the death of the donor.

A. The trust deed resulting in the transfer constituted a contract.

B. The nature and effect of the contract was to vest the grantor, trustee, grantor's husband and her daughter with definite rights as of the date of the transfer.

C. Such contracts or deeds of trust have been before this Court in previous cases, and in all of them this Court held that an irrevocable trust operated to fix the rights to the property as of the time of the transfer, not as of the time of the decedent's death. This conclusion was reached by this Court, irrespective of whether the tax was imposed on the right to transmit the property or on the right to receive it. For while the nature of the transfer may affect the imposition of the tax, the latter does not determine the nature of the transfer which is already accomplished when the tax is imposed.

II. In imposing the tax the state violated the contract clause of Article I, Section 10 of the Constitution.

A. While the Court expressly held that the tax was governed by the statute in force at the time of the transfer, it actually gave effect to a statute enacted after the transfer.

(1) Appellant submits that the tax in question is not sustainable under the earlier statute, but is sustainable under the later statute, and

therefore it must be held that the later statute was applied.

(2) There are ample differences between the two statutes. The basis of the tax under the earlier statute is the property or any interest therein owned by the decedent at the time of her death. The later statute is made applicable also to property transferred before death and no longed owned by the decedent at the time of her death. Only under the later statute can the tax be imposed in this case. Furthermore, under the earlier statute, the question of intent to make the transfer take effect in possession or enjoyment at or after death is determinable by competent evidence from the instrument of transfer or from other sources. The later statute raises a presumption that a transfer in trust reserving a life interest is prima facie one intended to take effect at the death of the grantor. There was no evidence in this case to controvert the written instrument, and the conclusion of the court below could not be arrived at except through the presumption of the 1929 statute.

B. Since effect was given to a later statute, a question is properly raised under the contract clause, and this Court will give independent consideration to the question whether there was a contract, what was its nature and effect and whether any obligations thereunder have been impaired.

C. The imposition of the tax had to proceed on the assumption that the property which had already been transferred inter vivos, four years before death, continued to remain in the decedent until her death. thus impairing the rights and obligations under the contract.

III. The tax as imposed also violated the due process clause.

A. Under the appellant's claim that this constitutional provision has been violated, this Court will give independent consideration to the nature of the transaction which resulted in the transfer of the property.

B. The application of the 1929 Act was without due process because

(1) it changed and widened the basis of the tax, including therein the present transfer which could not be taxed under the earlier act;

(2) the retroactive application of this presumption in the 1929 Statute is likewise without due process.

C. It seems, furthermore, that the court below applied an absolute presumption that whenever a life income or interest is retained by the donor, the transfer takes place at death. Such an absolute presumption is clearly without due process, whether under the 1929 or 1923 statute.

D. Even if the court below gave effect to the 1923 Statute, the tax was without due process.

(1) Death duties may not be imposed on gifts inter vivos which are absolute during the life of the donor. The conclusion is inescapable that property transferred during lifetime through an irrevocable trust is not subject to death duties, unless made in contemplation of death. This transfer, it is stipulated, was not made in contemplation of death.

(2) The tax is not sustainable as a property tax, because the property was without the tax-

ing jurisdiction of the State of Connecticut. Nor is the tax sustainable as a gift tax, because the basis of the tax was the value of the property at the decedent's death, not as of the time when the gift was made.

IV. The tax as applied violated the equal protection clause.

A. The court below interpreted the statute to mean that the tax was imposed not on the succession to the property upon the decedent's death, but on the succession to the possession and enjoyment of the property. Thus interpreted, the statute imposes a gift tax, not an inheritance tax.

B. Considered as a gift tax, the classification is so arbitrary and unreasonable as to amount to a denial of equal protection.

V. The judgment of the court below should therefore be reversed as violative of the above provisions of the federal Constitution.

ARGUMENT.

Appellant submits that the deed of trust constituted a contract, the obligations of which have been impaired by the judgment holding that the transfer in question was intended to take effect in possession or enjoyment at the decedent's death, and that the property transferred was therefore subject to the Connecticut succession tax; also that the tax, as applied, was contrary to appellant's rights under the due process and equal protection clauses of the Fourteenth Amendment.

POINT I.

The Court Below Erred In Holding That The Transfer In Question Was Intended To Take Effect In Possession Or Enjoyment At The Death Of The Donor.

A. THE TRUST DEED CONSTITUTED A CONTRACT.

By the indenture dated December 28, 1926 (R. 5-9), Mrs. Sewell, as party of the first part, agreed to and did transfer to the Guaranty Trust Company, as party of the second part, the securities set forth in the schedule annexed to and made part of the instrument. The Trust Company agreed to and did accept the property, agreed to hold the same for uses specified in the instrument, and agreed to administer the property. In addition to the mutual promises and agreements, there was good and valuable consideration for the promises made by the Guaranty Trust Company, namely, the payment of compensation as provided in Paragraph 12 of the indenture, and there was good and valuable consideration for the promises and agreements of Mrs. Sewell, namely, the payment of income from the property during her lifetime and to her husband during his lifetime, and also the management of the property.

This trust deed contains all the elements of a contract and is analogous to the instruments in *Coolidge v. Long*, 282 U. S. 582, as to which this Court said (p. 595):

> "The trust deeds are contracts within the meaning of the contract clause of the federal Constitution."

B. NATURE AND EFFECT OF THE CONTRACT.

Under this contract, title in the property vested immediately in the trustee. While loosely it may be said that the grantor retained a life interest in the property,

actually she retained only a chose in action, one of the promises of the trustee being to pay her during her lifetime, an amount equal to the income from the property, less the administration expenses. So far as the transferor was concerned, it would have made no difference had the trustee paid her the same amounts from any other fund, or had the same amounts been made payable by a third person not a party to this transfer. In other words, there is a difference between the retention of a life interest in property and the acquisition of a right to payments measured to some extent by the income from such property. Assuming, however, that the decedent retained an interest for life in the property transferred, she had a well defined estate which vested in her on the date of the transfer and which terminated upon her death.

The trustee also became vested with a definite estate as of that date. It became the owner of the fee with full dominion over the property, except as provided in the trust instrument. This fee was determinable upon the death of the decedent's husband.

On the date of the execution of the instrument, the decedent's husband became the owner of an equitable estate similar to the one held by the decedent herself. He could sell, transfer or pledge it as security for a loan, or otherwise deal with his estate. The fact that the receipt of the income from the estate did not begin until the decedent's death simply meant that *one of the incidents* of the estate was not within his actual enjoyment until that time.

The same may be said about the daughter's rights which vested at the time of the transfer. She was to have the fee upon the death of her father. The fact that she could not have possession or the income of the prop-

erty did not mean that all her rights in the property were postponed, but only some of those rights. The case would not have been different had the income been accumulated and added to the principal until her father's death.

Shukert v. Allen, 273 U. S. 545.

Much was said by the court below concerning the transfer of "economic benefits" which did not take place until the death of the donor (R. 31). Appellant submits that an estate like the one received by the husband or the daughter at the time of the execution of the instrument is an "economic asset" or an "economic benefit." The receipt of the income or the possession or control of the property are some of the manifestations or incidents of this economic benefit. It is true that some of the manifestations or incidents were not realized until after the death of the grantor or until the death of the grantor's husband, but it is not correct to say that there was no transfer of economic benefits until then.

Frew vs. Bowers, 12 F. (2) 626, 627.

C. INTERPRETATIONS OF SUCH CONTRACTS BY THIS COURT.

(1) *An Irrevocable Trust Determines Estates at Time of Transfer.*

In recent years this Court has had occasion to determine the nature and effect of contracts similar to the one at bar. In *May v. Heiner,* 281 U. S. 238, the decedent executed an irrevocable trust which provided that the income be paid to her husband during his life; that at his death, if she survived him, the income should be paid to herself for life, and on her death or on her husband's death, whoever survived, the trust was to cease, and the principal was to be paid to her children. This Court

held that the federal estate tax could not be imposed on the transfer of this property, because the tax was imposed on the transfer of property or any interest therein owned by the decedent at the time of her death, and at her death she retained no interest upon which such tax could be imposed.

The significance of that decision, for the purposes of the present case, is that by the irrevocable trust the decedent parted with her property during her lifetime, retaining only the right to income for life, and that right was extinguished at the time of her death. Mr. Justice McReynolds, delivering the opinion, said (p. 243):

> "At the death of Mrs. May, *no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed.* The interest therein which she possessed immediately prior to her death was obliterated by that event." (Italics supplied.)

This case was followed by three others. In *Commissioner of Internal Revenue v. Northern Trust Company*, 283 U. S. 782, there was an irrevocable trust wherein the settlor reserved a life use with remainders over. The same state of facts was presented by *Morsman v. Commissioner of Internal Revenue*, 283 U. S. 783. In *McCormick v. Commissioner of Internal Revenue*, 283 U. S. 784, the trust instrument provided that the income should be accumulated and added to the principal, except that, if in any year the settlor's net income should be less than a specified amount, she could take from the trust income enough to make up the deficiency, and also that the trustee should pay out of the income any amounts she might designate for charitable purposes. The trust deed created remainders in the settlor's children with a further provision that if she survived them, the property should

revert to her. All these cases were decided on the authority of *May v. Heiner*, supra.

The necessary implication of those decisions was that the transfers in question were not intended to take effect in possession or enjoyment at or after death. That implication as to the nature of the contract was necessary to the conclusion that the federal estate tax was not applicable.

All the above cases were preceded by the case of *Reinecke v. Northern Trust Company*, 278 U. S. 339. There the settlor created five trusts in each of which the income was reserved to another for life or until five years after the settlor's life, whichever was first, with remainders over to others. The settlor reserved a right to revoke each trust with the consent of its respective tenant. This Court held that since the power to revoke was dependent on the consent of the one entitled to the beneficial and, consequently, adverse interest, the trust had passed as completely from the control of the settlor as if the gifts had been absolute. Mr. Justice STONE, delivering the opinion of the Court, said (348):

> "In the light of the general purpose of the statute and the language of Section 401 explicitly imposing the tax on the net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in Section 402 (c) 'to take effect in possession or enjoyment at or after his death', include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under Section 401. That doubt must be resolved in favor of the taxpayer."

(2) *Nature of Transfer Does Not Depend on Nature of Tax.*

In commenting on the above quotation, the Supreme Court of Errors said (R. 30):

> "It is obvious * * * that the decision, upon which the succeeding cases relied, was motivated by the nature of the federal estate tax, which is upon the transfer of, rather than the succession to, property of the decedent."

We think that the court below incorrectly interpreted the reasoning of this Court in *Reinecke v. Northern Trust Company* and the cases which followed. *The imposition of the tax may depend upon the nature of the transfer, but the nature of the transfer does not depend upon the tax.* That is to say, in each of those cases the decedent could have transferred the property in such a manner as to make it subject to a transfer tax or a succession tax or both or neither. But when the tax was imposed, it did not change the nature of the transfer, which had already been accomplished. So in the present case, whether the tax is one imposed on the right to transfer or on the right to succeed to property, that has no relation to the question whether the transfer was one intended to take effect in possession or enjoyment at or after death or whether it was absolute at the time when made.

This is aptly illustrated by the two cases of

> *Nichols v. Coolidge*, 274 U. S. 531, and
> *Coolidge v. Long*, 282 U. S. 582,

which involved the same instruments of transfer. It is true, in both cases the ultimate question for determination was as to the retroactive application of the tax, but in order to reach the conclusion that the retroactive application was unconstitutional, this Court had to deter-

mine the nature and effect of the transfer. As to that Mr. Justice BUTLER said in *Coolidge v. Long*, supra, (p. 597):

> "By the deed of each grantor one-fifth of the remainder *was immediately vested* in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. * * * The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. * * * Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. *Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen.*" (Italics supplied.)

To complete the parallelism between transfer and succession taxes, and their relation to the nature of the transfer, Mr. Justice BUTLER said in *Coolidge v. Long* (p. 598):

> "Succession is effected as completely by a transfer of a life estate to one and remainder over to another as by a transfer in fee. *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 347-348."

The fact that the tax imposed by the State of Massachusetts was a succession tax, and not a transfer tax, made no difference in the decision of this Court. Yet, the opinion of the court below does not mention the case of *Coolidge v. Long*. In the case at bar, as in *Coolidge v. Long*, the death of the settlor was not the generating source of any right in the remaindermen. Nothing moved from her when she died. The rights of the remaindermen, including possession and enjoyment upon the termination of the decedent's life, were derived solely from the deed.

As a matter of fact, such was the holding of the Supreme Court of Errors in *Blodgett v. Union & New Haven Trust Co.*, 97 Conn. 405, 410, concerning the nature and effect of an irrevocable trust. There the deceased had transferred certain securities in trust to pay the income of the fund to the settlor for life and at her death to deliver the fund to her daughter. With reference to the question whether this was a gift to take effect at death, the Court said:

> "The phrase 'gift to take effect at death' in its context, evidently means a gift *in futuro* to take effect at death, of an interest in property possessed by the decedent at the time of his death. The gift in question was a gift *in praesenti* of the remainder interest in property of which the decedent reserved no more than a life interest which was extinguished by her death."

And yet, under the 1913 Act held applicable in the above case, as under the 1923 or 1929 Act held applicable in the case at bar, the Connecticut tax was a succession tax and not a transfer tax.

Blodgett v. New Britain Trust Co., 108 Conn. 715, 720, 145 Atl. 56;
Silberman v. Blodgett, 105 Conn. 192, 201, 202, 134 Atl. 778;
Bankers Trust Co. v. Blodgett, 96 Conn. 361, 365, 114 Atl. 104.

This being the nature and effect of the contract, resulting in the transfer of the property, appellant will proceed to show that its constitutional rights have been violated.

POINT II.

In Imposing The Tax The State Violated Appellant's Rights Under The Contract Clause Of Article I, Section 10 Of The Constitution.

In order to show a violation of the contract clause, it is incumbent upon appellant first to show that the court below has given effect to a statute enacted after the above contract, and that the application of such statute has operated to impair obligations under the contract.

A. THE COURT BELOW ACTUALLY GAVE EFFECT TO A SUBSEQUENT STATUTE.

It is conceded, of course, that in order to show that its rights under the contract clause had been violated, appellant must point to a law passed by the legislature of the state, which on its face varies the rights of parties to a pre-existing contract or which is so judicially applied to a contract in existence at the time of the enactment of the statute as to vary the rights under that contract.

Fletcher v. Peck, 6 Cr. 87;
Dartmouth College v. Woodward, 4 Wheat. 518.

It is also conceded by appellant that a subsequent interpretation of a statute in existence at the time of the contract can not be attacked as violative of the contract clause.

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 451.

But where a state court, in interpreting a prior statute, actually gives effect to a subsequent statute, the protection of the contract clause may be invoked.

McCullough v. Virginia, 172 U. S. 102, 116-7;
Hubert v. New Orleans, 215 U. S. 170, 175;
Carondelet Canal Co. v. Louisiana, 233 U. S. 362, 376;

Louisiana Ry. & Navigation Co. v. New Orleans, 235 U. S. 164, 171;
Long Sault Development Co. v. Call, 242 U. S. 272, 277.

In such cases, before entering upon an examination of the contract, in order to determine whether the rights thereunder have been violated, this Court will first ascertain whether the state court actually gave effect to a subsequent statute. The statements in the opinion of the state court will be given great weight, but this Court will not be bound by the language used; it will look to the actual effect of the decision. As Mr. Justice HUGHES said in *Louisiana Ry. & Navig. Co. v. New Orleans*, 235 U. S. 164, 171:

> "And, in determining whether effect has been given to the later statute, this court is not limited to the mere consideration of the language of the opinion of the state court."

(1) *Test for Determining Application of Subsequent Enactment.*

There are several tests for applying this rule, but appellant relies only on the test most favorable to the appellee; namely, that *where the application of a statute is sustainable only under a subsequent enactment, and not under a prior enactment, it must follow that the state court has given effect to the later statute, any language in the opinion to the contrary notwithstanding.*

The court below distinguished the present controversy from other cases involving the constitutionality of such taxing statutes, by saying (R. 27):

> "None of the transfers involved in the cases now under consideration involve retrospective operation of the law, * * *"

and it concluded its opinion by ruling (R. 36-7) that the property "passed by deed, grant or gift intended to take effect in possession or enjoyment at the death of the grantor or donor within the meaning of the Connecticut succession tax statute *in force at the execution of the instrument of transfer.*" (Italics supplied.)

But in speaking of the applicable statutory provisions, the Supreme Court of Errors recognized no distinction between the prior and subsequent statutes. It said (R. 26):

> "The original Connecticut Act, Chapter 180, Public Acts 1889, Sec. 1, included provisions for a tax on 'property within the jurisdiction of this State, and any interest therein, * * * which shall pass * * * by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, in trust or otherwise.' In 1897 (Public Acts, Chap. 201) this provision does not appear, but it was restored, in substance, by Sec. 3 of Chapter 332, Public Acts of 1915, and has since continued unchanged in any respect materially affecting the present inquiry. General Statutes (1918), Secs. 1261-1271; Public Acts 1929, Chap. 299, Secs. 1 and 2; General Statutes (1930), Chap. 77, Secs. 1360, 1361."

(2) *Judgment Sustainable Only Under Later Statute.*

Appellant submits that there were ample material changes in the statute. The judgment of the court below may be sustained under the 1929 statute, but it is not sustainable under the 1923 statute.

(a) Difference In Basis Of The Tax.

The basis for computing the tax in the 1923 statute is *the property or any interest therein owned by the decedent at the time of his death,* whereas in the 1929 Act,

it is immaterial whether or not the property transferred was owned by the decedent at the time of his death. Property transferred earlier and no longer owned by the decedent may nevertheless be subject to the tax under the later act, if the intent was to have the transfer take effect at or after the grantor's death.

In the present case the transferor retained a life income from the property, which interest became extinguished at the time of her death. It is conceded that had any income from the property received during her lifetime accumulated at the time of her death, such accumulated income would be the proper measure of the tax under the 1923 Act. But the corpus of the trust, with which she had parted four years before her death, could not be taken as a measure of the succession tax, because that was not the property or interest owned by her at the time of her death. Under the 1929 Act, however, if the transfer was intended to take effect at or after death, then the entire property would be the measure or basis of the succession tax.

(b) Presumption As To Nature Of Transfer.

The 1923 statute leaves the question of intent to be determined by competent evidence which may be gathered from the instrument of transfer and from other sources. The instrument of transfer itself contains no evidence of intent to have the transfer take effect at the death of the grantor. On the contrary, such irrevocable trusts have been before this Court in a large number of cases, such as:

Reinecke v. Northern Trust Co., 278 U. S. 339;
May v. Heiner, 281 U. S. 238;
Commissioner of Int. Rev. v. Northern Trust Co., 283 U. S. 782;

Morsman v. Commissioner of Int. Rev., 283 U. S. 783;
McCormick v. Comm'r Int. Rev., 283 U. S. 784;
Coolidge v. Long, 282 U. S. 582;

and it has been invariably held that the transfers took effect not at the death of the grantor, but at the time when the instrument of transfer was executed.

Since the only evidence before the court below was that contained in the written instrument, and there was no other evidence to counteract the written instrument and show that the real intent was to have the transfer take effect at the death of the grantor, the conclusion reached by the court below cannot be sustained under the provisions of the 1923 Act.

The 1929 Act raises a presumption that a transfer in which a life interest is retained by the donor is prima facie intended to take effect in possession or enjoyment at death. Under this Act, if applicable, it would have been incumbent upon the appellant to proceed and show by competent evidence that the decedent intended to part with the property, except the life interest therein, at the time when the instrument of transfer was executed.

In view of the above differences between the 1923 and 1929 Acts, and in view of the fact that the tax imposed is sustainable only under the later statute, it must be concluded that while the court below expressly said that the property was subject to tax under the Act in force at the time of the execution of the instrument, which was the 1923 Act, it actually gave effect to the 1929 Act.

B. APPLICATION OF THE SUBSEQUENT STATUTE CALLS FOR AN INDEPENDENT CONSIDERATION OF THE CONTRACT.

Since the court below gave effect to the later statute, this Court will determine for itself whether there was a contract; what was its effect and whether the statute, as applied, impaired any of the obligations thereunder.

> *Appleby v. City of New York*, 271 U. S. 364, 380;
> *Larson v. South Dakota*, 278 U. S. 429, 433;
> *Coolidge v. Long*, 282 U. S. 582, 597.

In *Appleby v. City of New York*, supra, the Court, in an opinion by Chief Justice TAFT, stated more definitely what it meant by giving "independent consideration" to the nature and effect of the contract (pp. 379-380):

> "Of course we should give all proper weight to its (the state court's) judgment, but we cannot perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration. It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment. In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the state and city to part with property under navigable waters to private persons, free from subsequent regulating control of the water over the land and the land itself. *That is a state question, and we must determine it from the law of the State, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the state court then and since made;* but we must give our own judgment derived from such sources *and not accept the present conclusion of the state court* without inquiry." (Italics supplied.)

If the interpretation of the contract in the case at bar depends on local law, it has also been shown that at the time the trust deed was executed, the law of the state was that a transfer of an irrevocable trust was one *in praesenti*, not *in futuro*.

Blodgett v. Union & New Haven Trust Co., supra.

C. IMPAIRMENT OF OBLIGATIONS UNDER THE CONTRACT.

Appellant has already shown (pp. 10-17, supra) that there was a contract, and that its nature and effect was to fix the various estates in the decedent, the trustee, the decedent's husband and her daughter, as of the time of the transfer.

That the application of the 1929 Act resulted in an impairment of the rights and obligations under that contract follows from the proposition that such tax could be imposed only on the assumption that the property was in the transferor at the time of her death, whereas complete ownership of the property had passed during the life of the donor, and no interest of any kind remained to pass to the donees in consequence of the death which happened later.

Appellant does not claim that a state may not, consistently with the contract clause, impose a tax which would diminish the value of a contract to the taxpayer or make less valuable the fruits of such contract. Undoubtedly the state, in the proper exercise of its taxing power, may diminish the values of contracts, just as it diminishes the value of any other property subjected to taxation.

Orr v. Gilman, 183 U. S. 278;
Chanler v. Kelsey, 205 U. S. 466;

in which this Court sustained the validity of the New York transfer tax law enacted after the decedent had made a will containing a power of appointment. In *Moffit v. Kelley*, 218 U. S. 400, 402-3, this Court sustained an inheritance tax upon community property after the death of the husband, though the taxing statute was enacted after the contract of marriage had been entered into.

See also:

North Missouri R. R. v. Maguire, 20 Wall. 46, 61;
Providence Bank v. Billings, 4 Pet. 514, 562;
Kehrer v. Stewart, 197 U. S. 60;
Murray v. Charleston, 96 U. S. 432, 446;
Lake Superior Mines v. Lord, 271 U. S. 577,

all of which held that a tax upon a right, property, or income taking its source from a contract obligation is not violative of the contract clause. All these cases were cited in the dissenting opinion in *Coolidge v. Long*, supra, pp. 634-8, and as to all of them the dissenting justices were undoubtedly right.

But the discussion of those cases was founded on the following premise:

> "The present tax has no reference to the contract or its obligation save to recognize and observe the existence of both." (p. 634.)

That is just what the Court found to be otherwise upon analysis of the nature and effect of the contract. Since the contract was found to have vested the rights at the time of execution, the Court said (p. 595):

> "The trust deeds are contracts within the meaning of the contract clause of the Federal Constitution. They were fully executed before the taking

effect of the state law under which the excise is claimed. The Commonwealth was without authority by subsequent legislation, whether enacted under the guise of its power to tax or otherwise, to alter their effect or to impair or destroy rights which had vested under them."

In other words, while the state may impose a tax in recognition of a contract, it cannot impose a tax which could be sustained only on the assumption that the contract did not exist or that the obligations thereunder were different from what they actually were.

Wright v. Central of Georgia Ry. Co., 236 U. S. 674.
Farrington v. Tenn., 95 U. S. 679, 683.

In those cases the state itself was a party to the contract, and *Coolidge v. Long* merely added the obvious proposition that the same principle applies where the contract is one between private parties.

Although the tax is imposed on the beneficiaries' right to succeed to the property, the tax is a charge on and is collectible from the estate,

Conn. Laws of 1929, *Ch.* 299, *Sections* 36, 37; *Gen. St.* 1930, *Secs.* 1395, 1396,

and the impairment of the contract obligation results in an additional burden on the estate, which is appellant's cause for complaint.

If, on the other hand, the tax is deemed a burden only on the beneficiaries, then, of course, it follows that the obligations of the decedent and trustee toward them have been impaired, and appellant, as executor, may object in their behalf against this invasion of their constitutional right.

POINT III.

The Tax, As Applied, Violates Appellant's Rights Under The Due Process Clause Of The 14th Amendment.

Appellant does not maintain that the state may not impose a succession tax on transfers intended to take effect in possession or enjoyment at or after death. The right to tax such transfers, as a measure in aid of imposing death duties, has been established.

Nickel v. Cole, 256 U. S. 222
Keeney v. New York, 222 U. S. 525
Saltonstall v. Saltonstall, 276 U. S. 260
Chase National Bank v. United States, 278 U. S. 327, 334 et seq.

Appellant's contention under the due process clause is two-fold; *first*, that the application of the 1929 Act is without due process, and *second*, that under the 1923 statute, the state could not impose a tax on property transferred absolutely *inter vivos*, under the guise of imposing a succession tax.

As a preliminary step in the showing that the tax is in violation of the due process clause, petitioners submit that this Court is not bound by the state court's conclusion as to the nature of the transaction which resulted in the transfer of the property.

A. THE COURT WILL DETERMINE THE NATURE OF THE TRANSACTION.

In order to apply the tax (whether under the 1923 or 1929 Statute) to the present transfer, the court below interpreted the transaction resulting in the transfer as one in which the intent was to have the transfer take effect in possession or enjoyment at the death of the grantor. Without such interpretation of the contract,

the application of the statute would have been undoubtedly without due process. The basis of appellant's claim under the due process clause is that in order to avoid this unconstitutional result, the court below adopted an erroneous interpretation of the contract. Under such circumstances, as in cases where the protection of the contract clause is invoked, this Court will rely on its own interpretation of the contract to see whether the appellant's constitutional rights have been violated. In *Coolidge v. Long*, 282 U. S. 582, 597, Mr. Justice BUTLER said:

> "It is well understood that, when the jurisdiction of this court is invoked to determine whether a state law impairs the rights of the litigant under a prior contract, *or whether the State is depriving him of his property without due process of law in violation of the Fourteenth Amendment and the question turns upon the existence or terms of a contract*, this court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. That rule is necessary in order that this court may properly enforce these provisions of the Constitution." (Italics supplied.)

But aside from this rule as to the scope of review which this Court will exercise in determining the facts* at the basis of a claim that a constitutional right has been violated, this Court will examine the nature and effect of the transfer under the rule laid down in

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 270

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290

Fiske v. Kansas, 274 U. S. 380, 385,

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* As to the importance of determining such facts for the purpose of *applying*, as distinguished from *interpreting*, the Constitution, see the dissenting opinion of Mr. Justice BRANDEIS in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 410-411.

namely, *that where it is claimed that a state statute as applied to a given transaction violates a right guaranteed by the Constitution, and the state court, conceding that such application of the statute would be unconstitutional, nevertheless holds the statute applicable by interpreting the transaction to be otherwise than claimed, this Court will follow its own interpretation of the transaction in determining whether the appellant's constitutional rights have been violated.*

The court below treated the provision in the 1923 Act as applicable only to transfers intended to take effect in possession or enjoyment at or after death of the grantor, and it may be assumed that it would have held unconstitutional a succession tax imposed on such transfers as appellant claims the present transfer is. If that is so, then the error of the court below is *at least* in the interpretation of the transaction lying at the basis of appellant's constitutional claims under the due process and equal protection clauses, and therefore this Court will follow its own interpretation of the transaction.

In view of this rule as to the scope of review, and the true nature of the transaction discussed above (pp. 10-17), appellant submits that under either Act the tax is without due process.

B. APPLICATION OF THE 1929 ACT WITHOUT DUE PROCESS.

(1) *Change in the Basis of the Tax.*

Since the 1929 Act changed and widened the basis of the tax from the property owned by the decedent at the time of her death to the property transferred by the decedent during her lifetime, with the result that transfers, not theretofore taxable, became taxable under the

later Act, the retroactive application of that Act is a violation of the due process clause.

This was established with reference to the due process clause of the Fifth Amendment in the cases decided by this Court under the Federal Gift Tax, as applied to gifts made prior to the effective date of the Revenue Act of 1924.

Blodgett v. Holden, 275 U. S. 142
Untermyer v. Anderson, 276 U. S. 440

The principle there enunciated applies equally to the due process clause of the 14th Amendment. As was said by this Court in *Coolidge v. Long*, supra, p. 596:

> "The States are similarly restrained by the due process clause of the Fourteenth Amendment."

If there was any doubt left as to the similarity between the Fifth and Fourteenth Amendments by the decision of this Court in *Coolidge v. Long*, supra, all doubts were dispelled by the decision in *Heiner v. Donnan*, 285 U. S. 312, in which the Court said (p. 326):

> "Nor is it material that the 14th Amendment was involved in the *Schlesinger* case instead of the 5th Amendment as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. *Coolidge v. Long*, 282 U. S. 582, 596."

In so far as the 1929 Act widened the basis or measure of the tax, its application is without due process. In this respect the case is on all fours with *Coolidge v. Long*, supra, and no further argument on this point is necessary.

(2) *Retroactive Application of Presumption Without Due Process.*

The provision in the 1929 Act, that all transfers in which a life interest is reserved shall be construed prima facie to have been intended to take effect at death, is likewise violative of the due process clause, as applied to transfers made prior to the enactment of that statute. The presumption is invalid because it "operates to deny a fair opportunity to repel it."

Western & Atlantic Railroad v. Henderson, 279 U. S. 639, 642

For it is raised as to a person's intent after she has departed this life, and of necessity the entire intent is contained in the writen instrument of transfer.

The transfer in this case was made in 1926, when the statute imposed a tax on transfers *actually* intended to take effect in possession or enjoyment at or after death, and the tax was measured by the decedent's interest in the property at death. The decedent presumably knew that when she made this transfer, she would not subject her estate to an additional tax burden on account of this transfer. In making the transfer, the decedent had a right to rely on this provision in the law, and that her estate would not be diminished because of the fact that she had transferred part of it as a gift. Had she known that a presumption would be raised, treating the transfer as one intended to take effect in possession or enjoyment at or after death, she might have expressed her intent so as to negative the presumption; she might have adopted a different mode of transfer, or she might have refrained from transferring the property altogether, and that quite apart from any intention to avoid the succession tax, for it was expressly stipulated herein that the *transfer was not made in contemplation of death.*

C. PRESUMPTION MADE ABSOLUTE AND WITHOUT DUE PROCESS.

It would seem that the court below applied not a rebuttable presumption, but an absolute presumption, holding, in effect, that *whenever a life income or interest is retained by the donor, the transfer takes place at death* and is therefore subject to the succession tax.

If that presumption was applied under the 1929 Act, then, of course, the tax is without due process.

Assuming, however, that the court below applied the 1923 statute, and not the 1929 amendment, the absolute presumption is still without due process. In applying that statute the court said (R. 27):

> "Transfers such as here involved, * * * that is, to trustees to pay the income to the transferor during life with directions that upon his death the corpus shall be paid to designated beneficiaries, though the trust be irrevocable, have been held by practically all courts, Federal and State, to fall within the meaning of a transfer intended to take effect in possession or enjoyment at or after the death of the transferor, * * *
>
> "* * * our full concurrence with the general view just stated is clearly indicated in *Blodgett v. Union & New Haven Trust Co.*, 97 Conn. 405, 410, 116 Atl. 908."

Whether that is the general holding of the Federal courts is debatable. Surely that was not the holding of this Court in *Coolidge v. Long*, supra. However, the Supreme Court of Errors held, in interpreting and applying the 1923 statute, that *as a matter of law* the reservation of a life income makes the transfer *one intended to take effect* in possession or enjoyment at or after death.

The question then arises whether the state may, by legislative fiat, determine whether the intent was to have the transfer take effect at one time or another, any expression in the instrument of transfer to the contrary notwithstanding. Appellant submits that while a rebuttable presumption, such as found in the 1929 Act, if not retroactively applied, would be valid because of the reasonable relation between such transfers and testamentary dispositions, an absolute presumption must fall within the constitutional prohibition so aptly stated by Mr. Justice BUTLER in the case of *Western and Atlantic R. R. Co. v. Henderson*, 279 U. S. 639, 642.

> "Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property.*" (Italics supplied.)
>
> *Manley v. Georgia*, 279 U. S. 1, 5-6.

An absolute presumption that a transfer was intended to take effect in possession or enjoyment at or after death stands in no better position than an absolute presumption that the transfer was made in contemplation of death.

Schlesinger v. Wisconsin, 270 U. S. 230, 240,
and
Heiner v. Donnan, 285 U. S. 312, 325,

in which the principle was laid down that "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment."

Otherwise, the state may include within the scope of the taxing statute, transfers made *inter vivos*, which are not testamentary in effect, and were not in fact intended to take effect in possession and enjoyment at or after death, though a life interest may have been retained by the grantor, as is the case here.

D. APPLICATION OF 1923 ACT WITHOUT DUE PROCESS.

Even if the court below gave no effect to the 1929 Act, but rested, as the opinion stated, on an application of the statute in force at the time of the transfer, appellant maintains that the application of the 1923 statute was wihout due process.

(1) *Death Duties May Not Be Imposed on Gifts Inter Vivos.*

Appellant's contention is that while a state may impose a succession tax on transfers intended to take effect at death, the state may not, consistently with the due process clause, impose a tax under the guise of a succession tax, on transfers which are absolute during the life of the grantor. While the state may impose a property tax on the property so transferred, or a gift tax, or some other excise, it may not impose such tax as a death duty.

Schlesinger v. Wisconsin, 270 U. S. 230
First National Bank v. Maine, 284 U. S. 312, 330
Heiner v. Donnan, 285 U. S. 312

In the last case, Mr. Justice SUTHERLAND, speaking for the Court, said (p. 328):

> "The thing taxed is the transmission of property from the dead to the living. It does not include pure gifts *inter vivos*. The tax rests, in essence, 'upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested . . . it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.' *Knowlton v. Moore*, 178 U. S. 41, 56, 57. The value of property transferred without consideration and in contemplation of death is included in the value of the gross estate of the decedent for the purposes of a death tax, because the transfer is considered to be testamentary in effect. *Milliken v. United States*, 283 U. S. 15, 23. But such a transfer, not so made, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (*Bromley v. McCaughn*, 280 U. S. 124), but obviously not subject to any form of death duty, since it bears no relation whatever to death. The 'generating source' of such a gift is to be found in the facts of life and not in the circumstance of death."

Whether the tax imposed is a transfer or succession tax, the generating source of the transfer must be the death of the transferor.

Knowlton v. Moore, 178 U. S. 41, 57, 59.
Edwards v. Slocum, 264 U. S. 61, 62-3
Y. M. C. A. v. Davis, 264 U. S. 47, 50.

While there is a reasonable connection between transfers made in contemplation of death, or those intended to take effect at or after death, on the one hand, and transfers made through testamentary disposition on the other, so that a tax on the former may be regarded as

being in aid of a tax on the latter, there is no reasonable relation between a tax on transfers *inter vivos* and the death duties sought to be imposed. To make property, transferred *inter vivos*, the basis of a succession tax is arbitrary and unreasonable, and therefore contrary to the due process clause.

Taking the rules laid down in the cases heretofore decided by this Court, (1) that **death duties may not be imposed on gifts inter vivos which are not testamentary in character**, *Heiner v. Donnan*, supra, and (2) that **a transfer made through an irrevocable trust, though a life interest may have been retained, is a gift inter vivos which vests as of the date of the transfer**, *Coolidge v. Long*, supra, then (3) the conclusion is inescapable that **property transferred during lifetime through an irrevocable trust is not subject to death duties, unless made in contemplation of death.** And the present transfer, it has been stipulated, was not made in contemplation of death.

(2) *Tax Not Sustainable As a Property or Gift Tax.*

The tax cannot be sustained as a succession tax. Appellant further submits, that the tax is not constitutionally sustainable, either as a property tax or as a tax on gifts *inter vivos*, under the recent rule testing the constitutionality of statutes in the light of other contemporary legislation.

> *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 479-80
> *Continental Baking Co. v. Woodring*, 286 U. S. 352, 369-70

As a property tax, it could not be sustained, because the property was without the taxing jurisdiction of the

state. In 1926, the decedent transferred it to a New York trust company in New York. Under the circumstances, the property itself was not subject to tax by the State of Connecticut.

Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 92.

As a tax imposed on gifts *inter vivos*, it clearly violates the due process clause, because (1) the tax is imposed on property assumed to be still in the transferor in 1930, whereas it had passed to the transferee in 1926, and (2) because the measure of the tax was not the value of the property in 1926, when the gifts were made, but the value in 1930, the date of the decedent's death (R. 37). Such a tax is no less arbitrary and unreasonable than a tax imposed on one person measured by the property or income of another.

Hoeper v. Wisconsin, 284 U. S. 206, 215

And with reference to this the Court said in *Heiner v. Donnan*, supra (pp. 326-7):

> "In substance and effect, the situation presented in the *Hoeper* case is the same as that presented here. In the first place, the tax, in part, is laid in respect of property shown not to have been transferred in contemplation of death and the complete title to which had passed to the donee during the lifetime of the donor; and secondly, the tax is not laid upon the transfer of the gift or in respect of its value. It is laid upon the transfer, and calculated upon the value, of the estate of the decedent, such value being enhanced by the fictitious inclusion of the gift, and the estate made liable for a tax computed upon that value. * * * Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the *Schlesinger* and *Hoeper* cases condemn as arbitrary and

a denial of due process of law. Such an exaction is not taxation but spoliation. 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.' *United States v. Railroad Company*, 17 Wall. 322, 326."

POINT IV.

The Tax, As Applied, Violates The Appellant's Rights Under The Equal Protection Clause.

It would seem that the Supreme Court of Errors attempted to set up a strained construction on the phrase "to take effect in possession or enjoyment" in order to make the tax applicable. In commenting on its former decision in *Blodgett v. Union and New Haven Trust Co.*, 97 Conn. 405, 410, 116 Atl. 908, the Court said (R. 27):

> "We there pointed out that the 'qualifying and enlarging phrase' 'in possession or enjoyment' included in our original succession tax Act (1889), dropped from the law in 1897, and reinserted in 1915, 'marks the difference between a tax on the privilege of succeeding to the property of a decedent, and a tax on the privilege of succeeding to the possession and enjoyment of property which the decedent has conveyed away during his lifetime, reserving only a right to the income during his own life'."

As a matter of fact, this construction is not new to this Court. It was the construction used by the Supreme Judicial Court of Massachusetts in *Coolidge v. Long*, 268 Mass. 443, 167 N. E. 757, in order to avoid the retroactive application of the tax. That court said (pp. 447, 448, 449):

> "The 'tax authorized by these statutes is a tax upon "succession" which includes the "privileges

> enjoyed by the beneficiary of succeeding to the possession and enjoyment of property". * * *"
>
> It is manifest from the terms of the declaration of trust that the death of the survivor of the settlors was expressly fixed as the effective date of succession by the final beneficiaries to the enjoyment of the principal and income of the trust estate."

We accept this construction of the statute, but maintain that it only increases the constitutional difficulties. The best answer to this distinction between succession to the property of a decedent and succession to possession and enjoyment is found in the opinion of the Supreme Court of Pennsylvania in *Houston's Estate,* 276 Pa. 330, quoted with approval in *Coolidge v. Long,* supra, (p. 604):

> "Nor can it be successfully argued that the tax is not on the transfer of title to the property, but on the transfer of enjoyment, for, as it seems to us, the act means by this the right of enjoyment, and this was vested under the deed. If the tax is imposed when enjoyment is perfected by actual possession, and this theory is carried to its logical conclusion, it would seem that if, during the administration of an estate, delays occur, as they necessarily must, and if, before actual distribution is made, the rate of taxation is changed, a legacy would be taxed at the changed rate, which would appear to be *reductio ad absurdum.*"

But there are further reasons why this construction leads to the invalidity of the statute. In attempting to avoid the retroactive operation of the tax, the state court in *Coolidge v. Long* really changed the effect of the tax from one on succession to property upon death to mere commencement of ability to spend the income or corpus of the trust. In other words, it was not a succession tax. This change in the nature of the tax was recognized in the

dissenting opinion written by Mr. Justice ROBERTS, when he said (p. 634):

> "Receipt in possession and enjoyment is as much a taxable occasion as the enjoyment of any other incident of property."

Likewise appellant submits, if the Supreme Court of Errors meant that the tax was not one imposed upon the privilege of succeeding to the property of the grantor because of her death, but a tax merely on coming into possession and enjoyment after the death of the grantor, without the necessary causal relation between the death and the succession, that is, without death being the generating source of the succession, then this is not an inheritance tax. It is neither a transfer nor a succession tax, but a gift tax, limited in its application to instances where the ability to enjoy some of the attributes of the gift ripens after the death of the donor. Such a tax on gifts clearly violates the equal protection clause.*

First, the state of Connecticut imposes no tax on gifts *inter vivos*, and to single out transfers in which one reserves a life estate as a separate class for taxation is so arbitrary and unreasonable as to violate this constitutional limitation. We repeat that gifts made in contemplation of death, or those intended to take effect at or after death of the donor may be classed for taxation together with testamentary dispositions. Their classification as such is not arbitrary and unreasonable, because they are testamentary in effect, and may be taxed *in aid* of taxes imposed on transfers made through testamentary dispositions or by operation of the intestacy laws. This reason is lacking in the present case.

---

* That such a tax violates the due process clause has already been shown. See pp. 36-37, supra.

As a practical matter, the state may draw within its taxing net most of the successions to possession or enjoyment at or after the death of the grantor, by raising a presumption that the reservation of a life income in the grantor shall be evidence of intent to have the transfer take effect at death. That is exactly what the State of Connecticut did in the 1929 Act. But even there the tax is sustainable not by the mere coming into possession or enjoyment after the death of the grantor, but by the intent to substitute this mode of transfer for a testamentary disposition. In other words, the *death of the grantor must nevertheless be the generating source of the transfer.*

Second, assuming that a tax on succession to possession or enjoyment, without death as a generating source, is based on a presumably reasonable classification, though other gifts are not taxed, the tax would operate so arbitrarily and unequally as to be contrary to the equal protection clause. For example:

(a) It would be most arbitrary and unreasonable to differentiate between coming into possession or enjoyment after the death of the grantor and the same event occurring before the death of the grantor, where the transfer was complete before, and had no relation to, the death of the grantor. Thus, if A transferred his property to B absolutely in 1926, and before coming into possession or enjoyment of the property, B became subject to a civil disability which prevented his coming into possession or enjoyment until after the death of A, the State could not impose a succession tax upon the removal of B's disability.

(b) It would be most arbitrary to impose a tax on a gift not intended to take effect at or after death, but in which the transferor retained a life interest, and not to

impose a like tax upon the same gift less an amount which would be equivalent to a life interest computed upon mortality and probability tables.

(c) Suppose A had transferred his property absolutely to B, with the provision, however, that the income from the property should be accumulated and added to the principal for a period of 20 years. Would it be reasonable to impose a tax if A lived less than 20 years, but not to impose such a tax if he lived for more than 20 years? The imposition of such tax would then depend not on the gift or transfer, but on such unrelated and accidental causes as may enter into the death of the grantor.

(d) The same conclusion must be reached if A transferred the property absolutely to B with the provision that the income from the property be paid to C for life. Would it be reasonable to impose a tax if C survived A, but not if A survived C?

These examples of arbitrary discrimination can be multiplied indefinitely.

Wherefore appellant prays that the judgment of the court below be reversed.

Dated November, 1932.

Respectfully submitted,

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CHARLES ELMORE

No. 217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

GUARANTY TRUST COMPANY, EXECUTOR, ETC.,
Appellant,

vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER,
Appellee.

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

APPELLANT'S REPLY BRIEF.

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The applicability of the 1929 statute was *drawn into question* at the time when the parties hereto stipulated the questions of law to be reserved for the advice of the Supreme Court of Errors. The first question read as follows (R. 21):

> "(1) Did the property which was the subject of transfer by the indenture dated Dec. 28th, 1926, Exhibit A 'pass by deed, grant or gift * * * intended to take effect in possession or enjoyment at the death of the grantor or donor', within the meaning of the Connecticut Succession Tax Statute, in force at the date of the execution of said deed, or within the meaning of any subsequent amendment or revision of said succession tax statute."

The appellee overlooks that the applicability of the 1929 act was thus drawn into question at the very beginning of the controversy in the Superior Court, and that probably accounts for the *abridgement* of the first question as stated on page 3 of appellee's brief.

Appellant admits, of course, that the court below held the 1923 Act applicable. Appellant maintains that the court below really gave effect to the 1929 statute; otherwise the decision would be too incongruous as compared with the provisions of the 1923 statute.

Appellee states (p. 59): "Our whole brief has been directed to showing that the 1923 Act applies. We are content to stand or fall upon that. It is respectfully submitted that appellant is erroneous in claiming that the 1923 act cannot apply and in claiming that the court below applied some other act."

Yet, at no place in the brief does the appellee even attempt to show how it is possible to apply a statute which imposes a succession tax on transfers of "all property

and any interest therein owned by a resident of this state at the time of his decease" to a transfer of property which was not owned by the deceased at the time of her death, but had been irrevocably transferred some four years earlier. At the time of her decease Mrs. Sewell owned no part of the property, except whatever income might have accumulated during her lifetime.

At no place in his brief does the appellee show that *in this particular case,* (for we are dealing with this case and not with the general class of cases, *Aldridge vs. United States,* 283 U. S. 308, 314), the transfer was intended to take effect in possession or enjoyment at or after death. We have shown that in previous cases involving both estate taxes (*May vs. Heiner,* 281 U. S. 238) and succession taxes (*Coolidge vs. Long,* 282 U. S. 582) this Court has held that irrevocable trusts operate to vest the property rights at the time of the execution of the transfer. There is nothing in the instrument of transfer in this case to indicate a contrary intent. The 1929 Act, which widened the scope of the tax, provided that where there is a reservation of a life interest, the transfer should be construed prima facie to have been intended to take effect at death. The only reasonable conclusion is that under the 1923 statute the state of Connecticut sought to tax only those transfers which were *actually* intended to take effect at death.

Instead, the appellee insists that under the 1923 statute, the reservation of a life interest indicates, *as a matter of law,* an intent to have the transfer take effect at death. This would not only lead to unconstitutionality because of an absolute irrebuttable presumption (pp. 32-34 of our brief), but would lead to holding that the 1923 Act was unconstitutionally applied for lack of any evidence necessary to sustain the imposition of a succession tax. (*Fiske vs. Kansas,* 274 U. S. 380, 385).

It is for these reasons that we insist the court below must have applied the 1929 statute while attempting to interpret and apply the 1923 statute. And our conclusion is further supported by the treatment which the court below gave to the various statutes beginning with 1889 through 1930 (R. 26). That was not merely a historical review of the statute, as appellee states, but laid a foundation for applying a basis which is wider than that contained in the 1923 Act, for the court below said that the provision "has continued unchanged in any respect materially affecting the present inquiry", and cited the 1929 statute.

The reason for our conclusion that the court below gave effect to the subsequent, rather than the prior, statute, any language in the opinion to the contrary notwithstanding, is by far stronger than those found in the cases we cited on pages 18 and 19 of our brief, and the test we proposed for determining the application of the subsequent enactment is by far more favorable to the appellee than that applied in the cases cited.

Of course, if this Court should find that the court below, while interpreting the 1923 statute, actually gave effect to the 1929 statute, then this case falls squarely within the rule of *Coolidge vs. Long*, 282 U. S. 582, and no further argument in the case is necessary. If this Court should find that the 1923 statute was applied, then we come to the arguments under the due process clause and equal protection clause of the 14th Amendment.

II.

THE QUESTION UNDER THE DUE PROCESS CLAUSE.

A. Requirements Of Due Process.

Appellee has not met a single one of our arguments that the application of the 1923 statute was without due pro-

cess. He enumerates (pp. 48-49) three requirements of due process which were met in the case at bar. But these are not the only requirements. The appellee has not included the requirement, so aptly stated by this Court in *Schlesinger vs. Wisconsin*, 270 U. S. 230, and restated in *Heiner vs. Donnan*, 285 U. S. 312, 325, that "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert is so arbitrary and unreasonable that it can not stand under the 14th Amendment." Appellee also omitted the requirement of the due process clause that death duties may be imposed only on transfers which are testamentary in effect. We can enumerate many other requirements of the due process clause, but they would be as inapplicable here as those enumerated by the appellee.

The appellee makes no mention of the first requirement we added, and he disputes our contention that the transfer in this case was not testamentary in effect, for the reason that there was nothing which passed from the decedent at death upon which a death tax could be imposed. Appellee says (p. 49) that "this is the estate tax argument", which no decision of this Court would support. He overlooks, however, the minor detail that our statement (p. 16 of our brief) was in part a quotation and in part a paraphrase of the majority opinion in *Coolidge vs. Long*, 282 U. S. 582, 597, which dealt not with an estate tax, but with a succession tax. Mr. Justice BUTLER said (pp. 597-8):

> "Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. *Knowlton v. Moore*, 178 U. S. 41, 56. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if

the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors. The succession, when the time came, did not depend upon any permission or grant of the Commonwealth."

Instead, appellee relies on the dissenting opinion in *Coolidge vs. Long*. We have a profound respect for the dissenting opinion and the members of the Court who joined in it, but the fact nevertheless remains that the dissenting opinion is not the law of the land. Of the other cases cited by the appellee (pp. 50-54), *Keeney vs. New York*, 222 U. S. 525, involved a tax on a revocable trust and *Moffit vs. Kelly*, 218 U. S. 400, was distinguished* in the majority opinion of *Coolidge vs. Long*.

B. Extension Of Death Duties To Gifts Inter Vivos.

The real basis for appellee's argument under the due process clause is that all transfers, in which a life interest or income is reserved to the donor, are transfers intended to take effect in possession or enjoyment at or after death, and that they, like gifts made in contemplation of death, may be classified for taxation together with testamentary dispositions.

1. Are All Transfers, with Life Interests Reserved, Intended to Take Effect in Possession or Enjoyment at or After Death?

Appellant's view is that not all transfers in which a life interest is reserved may be included among those intended to take effect in possession or enjoyment at or after death. This was borne out by many decisions of this Court which were cited in our main brief, and which were cited by the appellee. But the appellee says that the cases decided by this Court under the Federal Estate Tax are not applicable, because there the Court dealt with a tax upon the

* For further distinction see Mr. Justice McReynold's opinion in No. 31, *Gwinn v. Comm'r. Int. Rev.*, decided Dec. 5th, 1932.

right to transmit property rather than on the right to receive it.

Appellee points out (pp. 25-42) many distinctions between estate and inheritance or succession taxes. We do not dispute that there are differences. But in not a single case, does the appellee show any difference in the two types of death duties which would make one and not the other applicable to irrevocable trusts. On the other hand, we have shown (pp. 15-17 of our brief) that the nature of the transfer does not depend on the nature of the tax. And what can be more convincing of a lack of difference in this respect between the two types of death duties than the cases of *Nichols vs. Coolidge*, 274 U. S. 531, and *Coolidge vs. Long*, 282 U. S. 582, both of which involved the same instruments of transfer and in both of which this Court said that the transfer was not testamentary in character, though the first involved an estate tax and the second a succession tax. So far as the Connecticut law is concerned, it was also pointed out (p. 17 of our brief) that the Supreme Court of Errors in *Blodgett v. Union & New Haven Trust Co.*, 97 Conn. 405, 410, in applying a succession tax also regarded an irrevocable trust as a "gift *in praesenti* of the remainder interest in property of which the decedent reserved no more than a life interest which was extinguished by her death." This was exactly the language used by Mr. Justice McReynolds in *May v. Heiner*, 281 U. S. 238, with reference to the estate tax.

Appellee finds consolation in the fact that neither *May v. Heiner*, nor the three cases which occasioned the 1931 amendment of Sec. 302(c) of the Revenue Act of 1926 rested on constitutional grounds, but merely on statutory construction. In order to show that these cases did not hold that Congress was without power to impose an estate

tax on irrevocable trusts, appellee quotes the *per curiam* decisions in the three cases, stressing the phrase "there being no question of the constitutional authority of Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved," and then translates that phrase (p. 20) to mean that the *per curiam* opinions expressly stated that there was no question of the constitutional authority of Congress to tax such transfers prospectively.

Appellee's argument is based on an erroneous conception concerning this Court's approach to constitutional questions, as also on a misunderstanding why this Court decided those three cases hurriedly. It is true, as appellee stated, the cases were heard on February 27, 1931, and were decided on March 2nd. This was in accord with the usual practice of this Court in rendering *per curiam* decisions on the Monday following the arguments when it becomes apparent that the points of law were fully covered by previous decisions. We find, however, no indication either in the cases, or in the decisions, or in the practice of this Court that, as appellee states (p. 20), "this Court knowing that the session of Congress was about to end, and realizing the vast amounts of money which might be involved in future similar cases, hastened to render decisions which might allow Congress to amend the law, at least with regard to future transactions." It is true that the power of Congress was vigorously argued in those cases, but having found a way of deciding the cases on the interpretation of the statute, "which has already been construed by this Court", then, "*in this view*", there was, of course, no constitutional question involved.

We can cite numerous cases in which this Court avoided passing on constitutional questions where it was possible

to dispose of the controversies on the basis of statutory construction.

Harriman v. Interstate Commerce Comm'n, 211 U. S. 407, 422
United States v. Del. & Hudson RR. Co., 213 U. S. 366, 407, 408
U. S. v. Standard Brewery, 251 U. S. 210, 220
Texas v. East Texas RR. Co., 258 U. S. 204, 217
Bratton v. Chandler, 260 U. S. 110, 114
Panama RR. Co. v. Johnson, 264 U. S. 375, 390
Ann Arbor RR. Co. v. U. S., 280 U. S. 658, 669.

But all this discussion of the estate tax cases is beside the point, for we relied on those cases solely for the purpose of showing that irrevocable trusts are not testamentary in effect, and we relied on *Coolidge v. Long*, together with the estate tax cases, for the purpose of showing that the nature of the transfer was not affected by the nature of the tax. That was not answered by the appellee.

2. May Irrevocable Trusts Be Classed Together with "Gifts in Contemplation" and "Gifts Intended"?

The appellee further argues that transfers in which a life interest or income is reserved may be classed together with gifts in contemplation of death for the purpose of imposing death duties. He seeks to establish a reasonable basis for a classification which would include irrevocable trusts. In so doing, appellee relies (pp. 6-8) on statements from the opinion of this Court in *Milliken v. U. S.*, 283 U. S. 15, 20, 23, and *Keeney v. New York*, 222 U. S. 525, in which this Court indicated that "the inclusion of this type of gifts in a single class with decedents' estates" was permissible "to insure equality of taxation and prevent evasion of estate taxes."

Of course, there is nothing *in this case* to indicate that the decedent attempted to evade the succession tax, and it was stipulated that the gift was not made in contemplation of death. However, we can safely go further in stating that, assuming it were the practice to avoid inheritance taxes through transfers *inter vivos* by irrevocable trusts, the desire of the legislature to equalize taxation would not justify the inclusion of irrevocable trusts into the same category with gifts in contemplation of death or those intended to take effect at or after death.

Gifts made in contemplation of death are gifts made *because* of impending death. Death is the cause or generating source of such transfer, the only difference between it and a testamentary disposition being the time when the gift takes place. In view of the fact, however, that this difference is a negligible element in the nature of the transfer, it is not unreasonable for the legislature to disregard it in formulating its tax policy. It must be noted, however, that in order to impose such tax, it must appear in each instance that the gift was made in contemplation of death. Without death being the cause or generating source of the transfer, the inclusion of the gift would be clearly arbitrary and unreasonable, no matter how great the desire on the part of the state to equalize taxation or to prevent tax avoidance.

Schlesinger v. Wisconsin, 270 U. S. 230
Heiner v. Donnan, 285 U. S. 312.

We shall now turn to gifts intended to take effect in possession or enjoyment at or after death, a notable example of which is the revocable trust, such as found in *Keeney v. New York*, 222 U. S. 525. In such cases the gift is ambulatory. It does not come to rest and is not determined until the death of the donor. Until then he can revoke it. Therefore it can properly be said that the

gift takes effect in possession or enjoyment at the death of the donor. To say that the mere reservation of a life estate makes the transfer one intended to take effect in possession or enjoyment at or after death would be to go far beyond the reasonable connection between such transfers *inter vivos* and testamentary dispositions.

The appellee quotes at length from *Milliken v. United States* and *Keeney v. New York*, 194 N. Y. 281, 286, concerning the legislative motive which induced the inclusion of "gifts in contemplation" and "gifts intended" into those subjected to death duties. The motive, as stated in the opinions, is that it is "not wholly unnatural" for property owners to avoid the imposition of inheritance taxes by such means as gifts in contemplation of death and transfers with reservations of life interests, and that the states have sought to meet such methods by subjecting the transfers to death duties.

It was argued in *Nichols v. Coolidge*, 274 U. S. 531, as it is argued by the appellee here, that the legislative motive to prevent tax evasion and to equalize taxation justified the Government in imposing a death tax in all cases where there was a reservation of a life interest in the donor. To this Mr. Justice McReynolds, delivering the opinion of this Court, said (p. 540):

> "But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. The mere desire to equalize taxation cannot justify a burden on something not within Congressional power."

In other words, the legislative motive may add reasonableness to the extension of death duties to transfers which are not, strictly speaking, either testamentary dispositions or transfers by operation of the intestacy laws.

The reasonableness of the classification, however, must be found not in the legislative motive, but in the relation between the tax and the nature of the thing or event on which the tax is sought to be imposed.* The mere fact that by the exercise of rights incident to property the state's revenues may be diminished does not of itself justify the state in imposing taxes which are otherwise not constitutionally applicable, even if the state might have resorted to other methods of taxation. Thus a state may not impose an inheritance tax, though it might have imposed a gift tax,

Schlesinger v. Wisconsin, 270 U. S. 230,

or a stock transfer tax,

First National Bank v. Maine, 284 U. S. 312.

C. The Nature of the Present Tax.

Appellee concludes his argument on the question of due process by saying (p. 54) that "it is no concern of this Court what the state tax is called." That may or may not be so, but it is certainly of concern to this Court, in passing on the constitutionality of a tax to know, *what the tax is.* It may be, upon a close analysis of this so-called succession tax, the state actually imposed a property tax or a gift tax. It is for this reason that we have taken the broader view of statutory construction and have shown (pp. 36-38 of our brief) that, treating this tax either as a property tax or a gift tax, it must nevertheless be held invalid under the due process clause of the 14th Amendment.

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* See also the reasoning in No. 33, *Advance-Rumely Thresher Co., Inc., v. A. M. Jackson,* decided Dec. 5, 1932. The mere desire on the part of North Dakota to protect her principal industry was not sufficient to sustain the validity of the statute. The classification was found reasonable because of the circumstances surrounding the manufacture and use of the farm implements.

Undoubtedly this Court will go beyond what the tax is *called* and see what the tax actually *is*, as it did in the case of *Coolidge v. Long*. There the Massachusetts court *called* the tax one imposed on the succession to the possession or enjoyment of the property.

In passing on the constitutionality of the tax, and in determining what it actually *was*, rather than what it was *called*, this Court held that it *was* a tax on succession to property, the transfer of which took its source from the deed and not from the death. Therefore the tax was retroactive and could not be imposed. Had this Court stopped at the mere name of the tax, namely, as one upon coming into possession or enjoyment, then, as the dissenting opinion pointed out, there would have been no retroactivity in the application of the tax, for the Massachusetts law was enacted prior to the so-called coming into possession or enjoyment.

Is the situation different in the case at bar? Here also the court below said that the tax was imposed *not* "on the privilege of succeeding to the property of a decedent", *but* "on the privilege of succeeding to the possession and enjoyment of property which the decedent has conveyed away during his lifetime." The tax is of the same nature as in *Coolidge v. Long*. It is an inheritance tax imposed on a transfer not testamentary in character and is therefore without due process of law.

However, we have taken a more favorable position toward the appellee and assumed the possibility of the other alternative, that it was merely a tax on coming into possession or enjoyment. This leads to the argument under the equal protection clause.

III.

ARGUMENT UNDER THE EQUAL PROTECTION CLAUSE.

We have shown (pp. 38-42 of our brief) that if the court below interpreted the taxing statute as being applicable to cases where the possession and enjoyment of the property occurs after the death of the grantor, but without death being the generating source of the transfer, then the tax is not a succession tax but a gift tax, and that as such it is contrary to the equal protection clause of the 14th Amendment. Appellee's answer is, in effect, that gifts in contemplation of death and gifts made through revocable trusts, which are truly gifts *inter vivos,* were held to be properly singled out and included with testamentary dispositions, and therefore it is not unreasonable to include also the irrevocable trusts.

We have already shown the reasonable connection between gifts in contemplation of death and revocable trusts on the one hand, and testamentary dispositions on the other, and we have also shown that that reasonable connection is lacking when it comes to including irrevocable trusts. We have gone further and shown how such a tax is bound to operate arbitrarily and unequally, which was not answered by the appellee.

IV.

APPELLEE'S ANALYSIS OF CASES.

It will be noted that the cases analyzed by appellee (pp. 9-12), involving state succession taxes upon "gifts intended", dealt with revocable trusts. Since we admit that revocable trusts may be subjected to either estate or succession taxes, we regard those cases as irrelevant.

Appellee's analysis (pp. 13-24) of the cases dealing with irrevocable trusts under the federal estate tax like-

wise raise no important point of difference, for we cited those cases only for the proposition that in each one of them, in order to arrive at the conclusion reached by this Court, it was necessary to hold that the rights vested in the transferee at the time of execution of the instrument of transfer and not as of the death of the transferor.

The distinctions (pp. 25-42) shown to exist between estate taxes and inheritance or succession taxes are likewise admitted by the appellant, but appellant does not see the relevancy of the distinctions as casting any light on the question whether an estate tax or an inheritance tax or both or neither may be imposed upon an irrevocable trust not made in contemplation of death.

At last the appellee cites (pp. 43-47) a number of "recent state decisions" in which other state courts have adhered to the view taken by the court below. Of course, those cases are of no greater authority in this Court than the decision of the court below in the instant case. All but the Minnesota case, however, are easily distinguishable.

In *Worcester County National Bank v. Commissioner of Corporations and Taxation*, 275 Mass. 216; 175 N. E. 726, the question was whether a prior or subsequent statute was applicable, and the Court held that the statute in force at the time of the transfer applied. It does not appear from the opinion of the Court that the constitutional question was raised, but only that the property did not pass "by deed, grant or gift * * * made or intended to take effect in possession or enjoyment" after the death of the decedent, and also that there was "a bona fide purchase or full consideration." The Court went into the facts of the trust agreement, including the provision that the beneficiary, the wife of the settlor, would "accept her

provisions of said trust agreement and the fund to be paid to her thereunder, in full satisfaction of all right of dower or other of her rights in the property * * * which she might have against the estate of (the settlor) * * * if she should survive him", and that "if any provisions * * * (were) made for her in the will * * * she (would) accept said provisions as mere gifts to her as though she were a stranger." Upon these facts the Court held that the transaction was within the meaning of the statute and did not pass on the constitutionality of it.

In *The Matter of Barstow*, 253 N. Y. 123; 177 N. E. 177, affirming *per curiam* the judgment of the Appellate Division, 233 App. Div. 371; 244 N. Y. S. 588, neither the Court of Appeals nor the Appellate Division passed on any constitutional question. The only question of law discussed was whether an irrevocable trust operated to transfer the property as of the date of the deed of trust or as of the date of the decedent's death. The Appellate Division held that the beneficiaries "took their rights as of the day of the delivery of the deed." The state courts held the life estates of the donor's daughters were subject to the New York transfer tax, but the constitutionality of it was not contested.

In *State of Washington v. Suzzalo*, 14 Pac. (2) 37, there was also a question of statutory construction, and no constitutional question was mentioned in the opinion. There were three trusts. The first involved property within the state, and it was "conceded that an inheritance tax was payable on the property covered by the trust" (p. 38). The other two trusts consisted of "intangible personal property located within the State of Illinois, the beneficiaries of the trust to come into complete enjoyment thereof upon (the settlor's death)." It does not appear whether the trusts were revocable or irrevocable, but we

are willing to assume that they belonged to the latter class. The only question raised by the executor was whether the trust property, being without the state, was taxable under the statute of the State of Washington, and the state court held that it was. There was also a question whether or not the trusts were testamentary dispositions, and the Court came to the interesting conclusion that "the trust agreements under which respondents claim were not gifts inter vivos."

In *Ogden v. Milwaukee County*, 244 N. W. 571, there was evidence outside of the deed which led the County Court to find that the gifts were made and intended to take effect at or after the death of the grantor (p. 572). Of course, we admit that where a gift, though irrevocable in form, is *actually* intended to take effect at or after death, it may be subjected to a succession tax.

The Supreme Court of Wisconsin, however, did hold that having *interpreted* the statute so as to tax all gifts in which life interests were reserved, the statute did not offend the 14th Amendment. In this respect, we think, the Wisconsin court went beyond the interpretation of the statute and into its operation and effect. This, however, was dictum, for the basis of the decision was that upon the facts presented the gift was actually intended to take effect at the death of the grantor.

The same thought is carried out in the case of *Sherman v. Tax Commission of Ohio*, 181 N. E. 539. There the gifts were made more than two years before death, and the Court held that "the tax commission carried the burden * * * of showing by the greater weight of evidence that these gifts were * * * intended to take effect in possession or enjoyment at or after death" (p. 541). The Court held that the Commission had successfully carried

this burden, and that the trust instrument itself furnished all the necessary evidence. On the question whether the trust was revocable or not the Ohio court said:

> "Plaintiff in error insists that the trust is irrevocable. True, it recites that 'it is mutually agreed between the parties hereto that this trust is irrevocable,' and in the next breath a provision is injected into the instrument whereby it may be revoked. * * *
>
> "The donor in this case retained substantial control over the corpus of the trust instrument so long as she lived. * * *
>
> "Having held that the estates herein are not gifts inter vivos, the taxing of the interests here involved do not run counter to the 14th Amendment of the Federal Constitution."

We now come to the case of *Rising's Estate v. Minnesota*, 242 N. W. 459, where it was argued, as in the present case, that a transfer by an irrevocable trust was not within the purview of the inheritance tax statute, and that if the statute be construed so as to include such gift it must be held unconstitutional. The Minnesota court, with Judge Olsen dissenting, held that the statute was applicable, and that it was not unconstitutional.

Under the Minnesota statute a tax was imposed upon any transfer of property

> "(3) When the transfer is of property made by a resident * * * by deed, grant, bargain, sale or gift * * * intended to take effect in possession or enjoyment at or after such death.
>
> "(4) Such tax shall be imposed when any such person or corporation become beneficially entitled, in possession, or expectancy, to any property or the income thereof, by any such transfer whether made before or after the passage of this act."

It is evident from the wording of paragraph 4, above quoted, that the constitutionality of the statute is not free from doubt.

The Minnesota Court interpreted the statute as expressly reaching "gifts inter vivos, absolute except for the reservation of income to the donor for life." Both in this conclusion and in holding that a succession tax, as distinguished from an estate tax, may be imposed on an irrevocable trust, the court relied on *Blodgett v. Guaranty Trust Co.*, 114 Conn. 207, the case at bar. If the decision in the instant case is erroneous, the same fate must be shared by the Minnesota case.

Dated: December, 1932.

Respectfully submitted,

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Washington, D. C.
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No. 217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

GUARANTY TRUST COMPANY, EXECUTOR,
Appellant,

vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER,
Appellee,

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

MOTION TO AFFIRM AND BRIEF IN SUPPORT OF MOTION.

ERNEST L. AVERILL,
Deputy Attorney General,

FARWELL KNAPP,
Assistant Tax Commissioner.
Attorneys for Appellee

THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

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APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

MOTION TO AFFIRM.

Comes now the Appellee in the above entitled cause, by his counsel of record, and moves that the decision below be affirmed, on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

WILLIAM H. BLODGETT,
Tax Commissioner, Appellee,

By ERNEST L. AVERILL,
Deputy Attorney-General,
FARWELL KNAPP,
Assistant Tax Commissioner,
His Attorneys.

IN THE

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No. 217

GUARANTY TRUST COMPANY, EXECUTOR,
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vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER,
Appellee,

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

BRIEF IN SUPPORT OF MOTION

I. STATEMENT OF FACTS.

This case involves the power of the State of Connecticut to levy a succession tax upon the transfer by irrevocable trust deed, executed by a resident decedent, of certain securities, whereby the decedent reserved to herself the income thereof for life, with remainders over after her death; the trust deed having been executed after the enactment and effective date of the state statute purporting to tax such a transfer as a "gift intended to take effect in possession or enjoyment at

the death" of the donor. The case is reported below in 114 Conn. 207.

II. NO QUESTION CAN ARISE AS TO THE MEANING OR CONSTRUCTION OF THE TAXING STATUTE.

The Court below held that the legislature intended, by the words used in the statute, to tax such a transfer as the one in the case at bar. 114 Conn. 218.

It has been held many times by this Court that it will adopt and consider itself bound by the construction of the meaning of a state statute, made by the highest court of a state.

It would serve no useful purpose to cite all the cases to this effect. It is believed that the following two cases, both involving taxation, are typical:

In Stebbins v. Riley, 268 U. S. 137 (1925), this Court said at page 146,

> "Here the construction of the taxing act is not open to question. Its meaning and application have been determined by the Supreme Court of of California and by its determination we are bound".

In Keith v. Johnson, 271 U. S. 1 (1926), this Court said, at page 8,

> "This Court will follow the decisions of the state courts as to the meaning and proper application of the state transfer tax law, any expressions in its earlier decision to the contrary notwithstanding".

III. IT HAS ALREADY BEEN DECIDED BY THIS COURT THAT A STATE HAS POWER TO TAX SUCH A TRANSFER AS THIS PROSPECTIVELY.

The only remaining question, therefore, is whether the imposition of the tax in the case at bar would offend against the due process clause, the equal protection clause, or the contract clause of the Constitution of the United States. In other words, has a state power constitutionally to levy such a tax upon such a transfer?

Such power has been recognized by this Court in *Nickel v. Cole,* 256 U. S. 222 (1921). See also *Keeney v. New York,* 222 U. S. 525 (1912).

No question of retroactivity is involved in the case at bar, for the transfer was executed long after the passage and effective date of the taxing act. In *Coolidge v. Long,* 282 U. S. 582 (1931), Mr. Justice Butler, writing for the majority of this Court, said (p. 596):

> "Undoubtedly the State has power to lay such an excise upon property so passing after the taking effect of the taxing Act".

These words were directed to exactly the same statutory phrase as is here in question, and to an irrevocable transfer in trust wherein the settlor reserved to himself the life use—that is, they are exactly applicable to the case at bar.

In view of the above, the Appellee respectfully urges that no substantial question exists in the case at bar which requires further argument: and that,

consequently, the motion to affirm the decision below should be granted.

Respectfully submitted,

WM. H. BLODGETT, *Tax Commissioner, Appellee*

By ERNEST L. AVERILL,
Deputy Attorney-General

FARWELL KNAPP,
Assistant Tax Commissioner
His Attorneys

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No. 217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

GUARANTY TRUST COMPANY, EXECUTOR,
Appellant,

vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER,
Appellee,

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

BRIEF IN BEHALF OF APPELLEE.

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Attorneys for Appellee.

THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

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IN THE

Supreme Court of the United States

No. 217

OCTOBER TERM, 1932.

GUARANTY TRUST COMPANY, EXECUTOR,
Appellant,

vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER,
Appellee,

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

STATEMENT OF FACTS.

Harriet D. Sewell died May 20, 1930, domiciled in Greenwich, Connecticut (R. 3). On December 28, 1926, she transferred to Guaranty Trust Company of New York (appellant herein) certain stocks and bonds, worth several hundred thousand dollars, by irrevocable trust deed, wherein she reserved to herself the net income for her own life; thereafter the net income was to be paid to her husband for his life, with remainder in fee to her daughter if she survived, but if not, to the issue of the daughter, with a gift over in default of

such issue. Extensive powers of purchase, sale, and management of the corpus of the trust fund were given to the trustees by paragraphs four and eleven of the trust deed, but these powers were all to be exercised under the direction and control of settlor's husband as long as he lived, and thereafter under the direction and control of settlor herself, as long as she lived (R. 5-10). Settlor's husband and daughter survived her (R. 3).

The Tax Commissioner of the State of Connecticut (appellee herein) conceded that this transfer was not made in contemplation of death (R. 3), but claimed that it was subject to the Connecticut succession tax, under the statute in force at the time of the execution of the trust deed, as a gift intended to take effect in possession or enjoyment at or after the death of the donor.

The Connecticut succession tax law in force at the time of the execution of the trust deed was Chapter 190, Public Acts 1923, Section 1, which reads as follows:

> "Section 1. All property and any interest therein owned by a resident of this state at the time of his decease . . . which shall pass by will or inheritance under the laws of this state; and all gifts of such property by deed, grant or other conveyance, made in contemplation of the death of the grantor or donor, or intended to take effect in possession or enjoyment at or after the death of such grantor or donor, shall be subject to the tax herein prescribed . . . "

A report concerning the transfer was duly filed on behalf of the present appellant in the Probate Court

for the District of Greenwich (R. 4), and the Tax Commissioner duly filed his computation of tax, claiming that the transfer was taxable (R. 4). The Probate Court made a decree finding the transfer non-taxable (R. 4). From this decree, the Tax Commissioner appealed to the Superior Court for Fairfield County, which, at the request of the parties, reserved the case for the advice of the Supreme Court of Errors (R. 22).

An agreed stipulation of facts (R. 3) was entered into in connection with this reservation, and it was stipulated that among the questions of law (R. 21) involved in the appeal were (1) whether the transfer was one which was by deed, grant or gift intended to take effect in possession or enjoyment at or after the death of the grantor or donor, within the meaning of the Connecticut statute in force at the date of execution of the trust deed, and (2) if the transfer were held so taxable, would the imposition of such tax offend against Amendment XIV of the Constitution of the United States or against any other provision of said Constitution.

The Supreme Court of Errors, in an opinion (R. 23) dated January 27, 1932, and reported in 114 Conn. 207, 158 Atl. 245, answered question (1) in the affirmative and question (2) in the negative.

A final judgment (R. 37) was entered in the Superior Court for Fairfield County in accordance with the holding of the Supreme Court of Errors; and from this final judgment the appellant herein has taken an appeal to this Court.

SUMMARY OF ARGUMENT.

This case involves the question of the power of the State of Connecticut to impose a succession tax upon a transfer of property by irrevocable trust deed reserving the life use to settlor, with remainders over after her death, as a gift "intended to take effect in possession or enjoyment at or after the death" of the donor, when such transfer was made by a resident and executed after the passage of a statute purporting to impose such a tax. The power of the state of domicile to impose a tax upon the succession to possession and enjoyment of property so transferred by a citizen is an incident of its sovereignty, and that power cannot be denied, unless somewhere within the Constitution of the United States is found a prohibition of its exercise.

Such power has uniformly been upheld by state courts, and it has been recognized by this Court in *Nickel v. Cole,* 256 U. S. 222 (1921) and *Keeney v. New York,* 222 U. S. 525 (1912), augmented by dicta in other cases. The text writers support the rule. Nor has the contrary been decided by this Court with reference to the Federal Estate Tax. The power of Congress prospectively to levy an estate tax upon such a transfer has never been denied. We submit, therefore, that the tax in the present case was within the power of the state to levy. Indeed, the law on this matter seemed to be well settled until the decision by this Court of certain cases, namely, *May v. Heiner,* 281 U. S. 238 (1930); *Commissioner v. Northern Trust Company,* 283 U. S. 782 (1931); *Morsman v. Commissioner,* 283 U. S. 783 (1931); and *McCormick v. Commissioner,* 283 U. S. 784 (1931). These cases, however, dealt with

the Federal Estate Tax and not with state succession taxes, and we believe that appellant has given a wrong construction to these decisions. They went off upon the question of Congress' intention. In the present case, the intention of the Connecticut legislature is not disputed; appellant admits (on page 3 of its Answer to Appellee's Motion to Affirm) that the Connecticut statute was intended to cover such a transfer; so that the cases just cited are inapplicable even by way of analogy, and even if this Court did not feel itself bound to adopt the lower court's holding as to the construction and meaning of the state statute (page 3, Appellee's Motion to Affirm, and cases cited therein). Further, even if this were not so, there is such a distinction between an estate and an inheritance tax that decisions as to the former are not necessarily controlling as to the latter. Finally, no showing can be made that the imposition of the tax in the present case offended against the due process clause, the contract clause, or the equal protection clause of the United States Constitution and the Amendments thereto.

We shall accordingly discuss first, the matter of "gifts intended to take effect in possession or enjoyment at or after death" in general terms; second, discuss authorities dealing with state succession taxes up to the decision of *May v. Heiner,* supra; third, cases in this Court dealing with an estate tax upon this sort of transfer, and, under this head, the question of intention and the question of the distinction between an estate and an inheritance tax; fourth, notice some recent state court decisions; and fifth, discuss appellant's specific claims of unconstitutionality.

I.

GENERAL DISCUSSION OF GIFTS INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER DEATH

The above phrase will, hereafter, for the sake of convenience be shortened to "gift intended". Succession taxes have long been used by the various states of this country, the first state law having been passed in 1826, in Pennsylvania; Act of April 7, 1826, Section 1. That statute contained the phrase "gift intended", which was copied by practically all the states in their laws. In Connecticut, the phrase was inserted in the first succession tax statute in 1889 (Section 1, Chapter 180, Connecticut Public Acts 1889) and continued until 1897. It was restored in 1915 (Section 3, Chapter 332, Connecticut Public Acts 1915), and has since continued unchanged in any material respect up to the present time. It is now to be found in Connecticut General Statutes, 1930 Revision, Sections 1360, 1361.

The reason for the inclusion of the phrase "gift intended", along with its companion phrase "gift in contemplation of death" is obvious; otherwise the succession tax would be so easy to avoid as to be wholly nugatory. Accordingly these two phrases have long been treated as proper complements of the succession tax imposed upon devolution by will or by intestacy. Of the phrase "gift in contemplation of death" it has recently been said by this Court:

> "It is sufficient for present purposes that such gifts are motivated by the same considerations as lead to testamentary dispositions of property,

> and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present (United States) statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of death taxes by gifts made before, but in contemplation of, death. It is thus an enactment in aid of, and an integral part of, the legislative scheme of taxation of transfers at death . . . We hold, as this Court has several times intimated, that the inclusion of this type of gifts in a single class with decedents' estates to ensure equality of taxation, and prevent evasion of estate taxes, is a permissible classification of an appropriate subject of taxation." *Milliken v. United States,* 283 U. S. 15, 20, 23 (1931).

These words are applicable with equal force to the phrase "gift intended". Of that phrase, it was said by the New York Court of Appeals, in *Matter of Keeney,* 194 N. Y. 281, at page 286 (affirmed 222 U. S. 525 (1912), *sub. nom. Keeney v. New York*)

> "A not wholly unnatural desire exists among owners of property to avoid the imposition of inheritance taxes upon the estates they may leave, so that such estates may pass to the objects of their bounty unimpaired. It is a matter of common knowledge that for this purpose trusts or other conveyances are made whereby the grantor reserves to himself the beneficial enjoyment of his estate during life. Were it not for the provision of the statute which is challenged, it is clear that in many cases the estate on the death of the grantor would pass free from tax to the same persons who would take it had the grantor made a will or died intestate. It is

> true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate. We think this fact justified the legislature in singling out this class of transfers as subject to a special tax."

This was said in 1909; it applies with even more force today, since with the recent great development in the use of living trusts—many of which are cast in this form because settlors wish to enjoy the income of their property during their lives and direct how the principal shall go after their deaths—the question of taxation assumes great practical importance.

II.

CASES DEALING WITH STATE SUCCESSION TAXES UPON "GIFTS INTENDED".

An immense amount of litigation has occurred upon this question, but no useful purpose would be served in citing all the cases. It is sufficient to say that all the cases in the state courts, which we have discovered, seem to be unanimously in accord with the decision of the court below in the case at bar. This is true from the first case, *Reish, Admr. v. Commonwealth,* 106 Pa. St. 521 (1884) down to the present. The general subject is exhaustively covered in an article by Professor Rottschaefer of the University of Minnesota in the Minnesota Law Review for April and May 1930 (Vol. 14, pages 453, 613). See also *Gleason & Otis on Inheritance Taxation* (4th Edition) pages 380 et seq. The more recent cases are collected in A. L. R. annotations, Vol. 49, p. 864 et seq, especially pp. 874-878, and Vol. 67, p. 1247-1253.

Gleason & Otis, supra, cite two decisions by this court as affirming the unanimous position of the state courts; namely, *Nickel v. Cole, supra,* 256 U. S. 222 (1921), and *Keeney v. New York, supra,* 222 U. S. 525 (1912). A closer analysis of these cases leads us to believe that they are not squarely in our favor, although very close to it; so that it cannot accurately be said that the exact point has already been decided by this Court. We proceed to analyse these two cases.

Nickel v. Cole, 256 U. S. 222 (1921). In this case settlor created an irrevocable trust, reserving the life

use to himself, with remainders over after his death. This was executed after the passage, but before the operative date, of a Nevada statute levying an inheritance tax upon gifts intended to take effect in possession or enjoyment at or after death. The state court upheld the tax, which was affirmed by this Court, Mr. Justice McKenna dissenting without opinion.

This is not, however, a square decision in our favor, for Mr. Justice Holmes, writing for the majority of this Court says (p. 224) that the taxpayer conceded that if the statute had been in operation before the execution of the trust deed, the tax would have been due, so this Court refrains from discussing this phase of the case. On the other hand, he adds (p. 225), the court below seems to have conceded that if the deed had been executed before the passage of the statute, no tax would be due. The court below arrived at its result by holding that the execution of the trust deed, and the execution of decedent's will (which occurred on the same day, and made similar dispositions) was one transaction, and gave no vested right until decedent's death. This Court refused to upset this, saying that the decision below was upon grounds which had no relation to any federal question, and adding (p. 226):

> "And when, as here, the statute unquestionably might have made the tax applicable to this transfer, we do not inquire very curiously into the reasoning by which the statute is held to justify the tax. 'As there was power to tax . . . the question whether or not the interest (of the plaintiff in error) under the circumstances was correctly subjected to the tax was a purely state question'. *Moffit v. Kelly,* 218 U. S. 400."

We submit that these words are applicable to the case at bar.

In *Keeney v. New York, supra,* 222 U. S. 525 (1912) it appears that the trust, wherein the settlor reserved the life use, was revocable. Neither the New York Court of Appeals nor this Court mentions that fact in their opinions, which are, therefore, apparently broad enough to cover the case of an irrevocable trust reserving the life use to settlor. But since the effect, if any, of revocability was neither argued nor noticed, we cannot rely on the case as a square authority in our favor. The argument was directed to, and the opinion dealt with other matters, namely, the broad questions of whether a state inheritance tax levied upon gifts intended to take effect in possession or enjoyment at or after death violates the due process clause or the equal protection clause. The case is, therefore, important for our purposes, since these same questions are raised by appellant in the case at bar and are, we believe, effectively disposed of by the opinion in *Keeney v. New York.* These points will be noticed more in detail later.

This was the state of the authorities up to the time of the decision of *May v. Heiner, supra,* in 1930. It is supposed, by the appellant and others, that that decision indicates the beginning of a new trend which, if logically followed out, will result in a ruling by this Court that a state has no power even prospectively to tax such a transfer as the one we are here concerned with. This result seems highly unlikely to us, since it would amount to a reversal not only of all the state authorities, but of *Nickel v. Cole, supra,* if not also of *Keeney v. New York, supra.* It springs, we believe,

from a misunderstanding of the effect of *May v. Heiner, supra,* together with *Commissioner v. Northern Trust Company, supra, Morsman v. Commissioner, supra,* and *McCormick v. Commissioner, supra.* In order to get at the root of this misunderstanding, it is necessary for us to analyze a line of cases in this Court leading up to the above-mentioned decisions.

III.

ANALYSIS OF CASES IN THIS COURT DEALING WITH ESTATE TAXES UPON IRREVOCABLE TRANSFERS IN TRUST.

We now turn to a consideration of a series of cases in this Court dealing with the liability to Federal Estate Tax of irrevocable transfers in trust wherein the settlor created life uses, with remainders over after his death. The Federal Estate Tax Law, since its beginning in 1916, has contained the phrase "gift intended to take effect in possession or enjoyment at or after the death of the donor". Every succeeding amendment has continued that phrase, and it is now to be found in C. 454, 46 Stat. 1516. This tax is usually held to be upon the interest which ceases by reason of the death of the decedent, rather than upon the interest to which some person succeeds because of a death. This distinction has, or may have, important theoretical bearings, as we shall attempt to show.

We shall confine ourselves to cases involving irrevocable trusts, since it is both obvious and well settled that if such a trust is revocable by the settlor it is subject to Federal estate tax *(Reinecke v. Northern Trust Co.,* 278 U. S. 339; *Chase National Bank v. United States,* 278 U. S., 327) and *a fortiori* is subject to succession tax *(Saltonstall v. Saltonstall,* 276 U. S. 260; *Blodgett v. Union & New Haven Trust Co.,* 97 Conn. 405, 116 Atl. 908).

Turning then to the cases in this Court dealing with such irrevocable trusts, we find that they are as follows:

(a) *Shwab v. Doyle,* 258 U. S. 529 (1922). It was held that an irrevocable trust created prior to the passage of the Federal estate tax, wherein the settlor created a life estate in the trust property, not for herself but for the benefit of some other person for his life, with remainders over to such life tenant's children, was not includible in the gross estate subject to Federal estate tax. In the first place, settlor retained no economic benefits whatever. But even if she had, the case holds that the Federal estate tax law of 1916 was not retroactive, and did not apply to a transfer made prior to its passage. This is exactly the same rule adopted by the court below, with reference to the Connecticut succession tax, in *Blodgett v. Union & New Haven Trust Co.,* 97 Conn. 405, 116 Atl. 908, *supra,* and by most other state courts.

(b) *Shukert v. Allen,* 273 U. S. 546 (1927). Here the settlor created a trust in 1921, retaining no interest in or control over it whatever, but providing that the income should be accumulated for 30 years (until 1951), unless the last of his three children should have died more than 21 years before that date, etc., and then to divide the principal and accumulated income among his three children by name. Settlor was 56 years old at the time, and the transfer was concededly not made in contemplation of death. It was held not subject to Federal estate tax. There was obviously no shifting of economic interests from the settlor to anybody else at his death; indeed the transfer was made with no

reference whatever to his death. Mr. Justice Holmes, writing for the court, said:

> " . . . But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death."

(c) *Nichols v. Coolidge,* 274 U. S. 531 (1927). Here husband and wife created an irrevocable trust in 1907 (prior to the passage of the Federal estate tax), reserving the life use to themselves, with remainders over after the death of the survivor of their five children, plus certain contingent remainders not here material. In 1917 the two settlors gave up and assigned to their children their entire interest in the property, especially any right to the income. The wife survived her husband and died in 1921. It was held that her estate was not subject to Federal estate tax with respect to the trust property. This case arose under the Federal Revenue Act of 1918, which was identical (in this regard) with the 1916 act under which *Shwab v. Doyle, supra,* was decided, except that the 1918 act contained the following parenthesis, which was not present in the 1916 act, viz: "(whether such transfer or trust is made or created before or after the passage of this Act)". In other words, *Nichols v. Coolidge* and *Shwab v. Doyle* are companion cases, the result of the two decisions being that if the irrevocable trust reserving life use to the settlor is made prior to the passage of the taxing law, it is not subject to Federal estate tax, no

matter whether the law purports to include it as taxable or not. This is substantially the same theory adopted with respect to a succession tax in *Blodgett v. Union & New Haven Trust Company, supra,* 97 Conn. 405, 116 Atl. 908. There is, also, another ground for the decision in *Nichols v. Coolidge,* quite apart from the fact that the trust was irrevocably created in 1907. This second ground is that in 1917 both settlors gave up any right to a life use. Thereafter they had none, so that there was no shifting of economic benefits at the death of the surviving spouse, since the children (originally remaindermen) from 1917 on enjoyed and possessed the income—the most important economic incident of the property. It is uncertain from the language of the court whether it relied on this second ground as well as the first, but presumably it did so.

(d) In *Reinecke v. Northern Trust Co.,* 278 U. S. 339 (1929), there were two sets of trusts. The first set of two trusts, reserving a life use to settlor, though created long before the passage of the Federal estate tax act of 1916, were nevertheless revocable by the settlor alone, and were accordingly held subject to the Federal estate tax in force in 1922, when the settlor died. This is clear, but is aside from the point we are now considering. Our concern is with the second set of five trusts created in 1919, while the Revenue Act of 1918 was in force. In these five trusts, settlor did not reserve any life use to himself, but in each case the income was made payable to a named beneficiary (presumably some relative of the settlor). Each trust was to terminate five years after the settlor's death or on the death of the respective life tenants, whichever

should first occur, with remainders over to others. The settlor reserved the right to revoke each of these five trusts with the consent of the respective life tenant. It will be noticed that the settlor retained no interest whatever in these trusts, either as to principal or income, except insofar as the qualified power to revoke was an interest. The court held that it was not, since the settlor's power to revoke was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, and that the trusts, for all practical purposes, had passed as completely from any control by the settlor which might inure to his own benefit as if the gifts had been absolute. That being so, it followed, from the rule of *Shukert v. Allen, supra,* that the trusts were not subject to Federal estate tax.

(e) *May v. Heiner,* 281 U. S. 238 (1930). In 1917 the settlor created an irrevocable trust, the income to be paid to her husband during his lifetime; at his death, if settlor survived him, the income to be paid to her for the rest of her life, and on her death, or on her husband's death if he survived her, the trust was to cease and the principal to be paid to settlor's children. Settlor died in 1920. It did not appear whether she survived her husband. It will be observed that the settlor did not retain for herself any present income, nor any power of control or disposition, nor any interest whatsoever in the trust property, with the single exception of a possible reversionary interest in the income in the event that her husband should predecease her.

This Court held that her estate was not subject to Federal Estate Tax with respect to this trust. The opin-

ion is short and relies almost wholly upon *Reinecke v. Northern Trust Co., supra.* The decision of *May v. Heiner* has caused a large amount of discussion and litigation, including the case at bar. Mr. Justice McReynolds, writing for the unanimous court, said (281 U. S. 243):

> "The record fails clearly to disclose whether or not Mrs. May survived her husband. Apparently she did not. But this is not of special importance since the refund should have been allowed in either event . . . At the death of Mrs. May no interest in the property under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

It is these words which have caused the discussion and litigation. Many fiduciaries interpreted the words as holding that an irrevocable trust, reserving the life use to settlor, was beyond the power of Congress to subject to an estate tax. Accordingly, the following cases were brought to this Court:

(f) *Morsman v. Commissioner, supra,* 283 U. S. 783, wherein settlor in 1922 created an irrevocable trust, reserving life use to himself, with remainders over.

(g) *Commissioner v. Northern Trust Co., supra,* 283 U. S. 782, with similar facts, except that the trust was created in 1917.

(h) *McCormick v. Commissioner, supra,* 283 U. S. 784, wherein the settlor, in 1918, created a trust providing that so long as she should live, the income should be accumulated and added to principal, except that if in any year her net income should be less than $250,000, she could take from the trust income enough to bring her total net income up to $250,000, and that the trustee should pay out of the net income any amounts to charities which she might designate. In no year did her income fall below $250,000, and practically all of the trust income each year was paid to various charities designated by her. The trust further created remainders over after her death, and provided that the trust could be terminated by settlor and any one of her three children (the remaindermen), and further that if settlor survived her children, the whole trust property should revert to her. She did not, however, survive her children.

These cases were argued before this Court on Friday, February 27, 1931. Three days later, on Monday, March 2, 1931, decisions were handed down in all of them. The opinions were per curiam, and were identical, except for reversal or affirmance of the lower court, depending on how the lower court decided. They read as follows:

> "Per curiam: The question in this case is that of the construction of Sec. 402 (c) of the Revenue Act of 1921, C. 136, 42 Stat. 277, 278, a provision similar to that of Sec. 402 (c) of the Revenue Act of 1918, C. 18, 40 Stat. 1057, 1097, which has already been construed by this Court, and, in this view, there being no question of the constitutional authority of the Congress to im-

> pose prospectively a tax with respect to transfers or trusts of the sort here involved, the judgment of the United States Circuit Court of Appeals for the (Seventh) Circuit is (reversed) upon the authority of *May v. Heiner*, 281 U. S. 238."

On the very next day, Tuesday, March 3, 1931 (being the last session day of Congress), a House Joint Resolution was hurriedly passed (C. 454, 46 Stat. 1516) and was approved by the President on the same day. It amended the first sentence of Sec. 402 (c) of the Revenue Act of 1926 to read as follows, the italicized words being new:

> "(c) to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property, or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom.*"

An interesting picture is thus presented. It seems to us that this Court, knowing that the session of Congress was about to end, and realizing the vast amounts of money which might be involved in future similar cases, hastened to render decisions which might allow Congress to amend the law, at least with regard to future transactions. In view of the words of the per curiam opinions, which expressly state that there is no question of the constitutional authority of Congress to tax such transfers prospectively and in view

of the further fact that in the briefs and arguments of these three cases the question of the *power* of Congress to levy such a tax was vigorously argued, it seems to us to follow that this Court held that as to past transactions Congress had not *intended* to tax such transfers by the phrase which existed in all the Federal estate tax laws from 1916 down to 1931, "intended to take effect in possession or enjoyment at or after death". Congress immediately responded by declaring its intention in no uncertain terms, at least as to future transactions.

This conclusion is fortified, at least as to *May v. Heiner*, by the words of this Court in the case of *Milliken v. United States*, 283 U. S. 15 (decided March 2, 1931, the same day as *Commissioner v. Northern Trust Co., supra*, and the two companion cases). It was said (283 U. S. 19):

> "Petitioners' argument that Sec. 402 does not apply is not supported by their citations of *Reinecke v. Northern Trust Co.*, 278 U. S. 339, and *May v. Heiner*, 281 U. S. 238. In those cases the gifts inter vivos were not 'in contemplation of death", and the only relevant question was one of construction, whether some of them were of the class intended by Congress to be taxable under sec. 402 (c) as transfers 'intended to take effect in possession or enjoyment at or after his death'. It was held that they were not."

In this connection, the following statement by Congressman Hawley, Chairman of the Ways and Means Committee of the House (Congressional Record, March 3, 1931, page 7017) is presented:

"MR. HAWLEY: Yesterday afternoon the Supreme Court of the United States handed down decisions in three cases—in which the Court held that where an owner of property had made a transfer in trust reserving the income of the property, or the right to dispose of the income therefrom, to himself for his life, with remainder to others after his death, the value of the property should not be included in the estate of the donor for the purposes of Federal estate tax upon his death.

"Section 402 (c) of the Revenue act of 1926 provides as follows: (reads it)

"It had generally been considered that this provision of the statute covered cases such as those referred to above. The Treasury Department had so construed the statute since the first Federal estate tax law in 1916, and its regulations so provide. If, for example, the owner of property transferred the title to his house to a trustee for the benefit of his children after his death, but in the meantime reserved the use, income and enjoment of the house to himself during his own lifetime, it was supposed that the value of the property at the date of his death should be included in his estate for purposes of estate tax. Under the decisions rendered yesterday the property would not be included in computing the Federal estate tax.

"It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property.

> "It is of the greatest importance, therefore, that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed."

These recent decisions of this Court (also including, by express reference, *May v. Heiner)* are therefore only on the intention of Congress, not on its constitutional authority, which has never yet been decided. It will require further litigation, based on irrevocable trusts created after the 1931 amendment, to show whether or not Congress, if clearly intending to levy a tax, can constitutionally do so. Certainly, in view of the above, *May v. Heiner* and the later cases can in no way be said to be any authority whatever for the proposition that the sovereign (whether Congress or legislature) cannot constitutionally levy a death tax with respect to irrevocable transfer in trust reserving a life use to the settlor. The most that these cases decide is (to repeat) that Congress did not intend to levy a tax by the phrase it used.

But whatever this Court's opinion may be as to the intention of Congress in the Federal Estate Tax, it is not important in the case at bar because there is here no issue as to the intention of the Connecticut legislature in the Connecticut succession tax. In the first place, the appellant agrees with us that the Connecticut legislature intended to tax this transfer by the words it used (see p. 3 of Appellant's Answer to Appellee's Motion to Affirm). In the second place, even if appellant disagreed with us on this point, this Court will adopt the construction, made by the court below, of

the meaning and intent of the state statute (see p. 3 of Appellee's Brief in Support of Motion to Affirm, and cases there cited). And in the third place, even if both previous reasons were invalid, we submit that decisions on the Federal Estate Tax have no necessary bearing upon succession taxes, so far as this sort of transfer is concerned.

A.

ANALYSIS OF THE DISTINCTION BETWEEN AN ESTATE TAX AND AN INHERITANCE OR SUCCESSION TAX.

We propose to show, under this head, that although an Estate Tax and an Inheritance (or Succession) tax are both death taxes and are parallel in many ways, yet there is a basic difference between them, so deep that decisions upon the validity or scope of one sort of tax have no necessary bearing or authority upon the other sort. This distinction, in brief, is that an Estate Tax is levied upon the *transfer from* a decedent, while an Inheritance (or Succession) Tax is levied upon the *receipt by* the legatee, devisee, heir, next-of-kin or donee of a decedent. The Estate Tax must, therefore, be measured by the property transferred by the decedent, and takes no account of the relationship of the recipient, nor of the amount he takes; whereas it is of the essence of an Inheritance (or Succession) Tax to determine the relationship of the beneficiary and the amount which he takes.

The emphasis in a succession tax is upon the recipient, and hence the words "in possession or enjoyment" in the phrase we are now considering have a special significance. They are not there by accident; and the interpretation to be given to them must logically have reference to the nature of the tax involved. It seems to us that on theory, as well as on authority, the change of economic benefits to, and the enlargement of property rights in, the remainderman consequent upon the death of the settlor in such a case as the one at bar, must

necessarily fall within the limits of a succession tax because of the very fact that the emphasis in a succession tax is upon the enlargement of property rights in a recipient consequent upon the death of the decedent.

On the other hand, the emphasis in an estate tax is upon the transferor and upon the property which he had at the time of his death and which passes *from* him. It might properly be said that the phrase "gift intended to take effect in *possession or enjoyment* at or after death" (standing alone and without further qualification) cannot reasonably be construed to refer to the cessation of the interest of the settlor in the case of an estate tax, where the emphasis is upon the transfer *from* the settlor, and has no proper application to such a situation as exists in the case at bar. This, it seems to us, may be said to be the basis of the decisions of *May v. Heiner, supra,* and the three subsequent cases, although not so stated therein. Or again, due to the emphasis in an estate tax, it may perhaps not be construed to include what might be termed "quasi-testamentary dispositions of property" unless such dispositions are specifically defined and mentioned in the law—for example, jointly owned property with the right of survivorship, *Tyler v. United States,* 281 U. S. 497 (1930). The taxability of such dispositions, if so defined and included in the law, may be upheld as proper statutory classification in order to prevent wholesale evasion; but if not so included the law will not be construed to cover them, again because of the emphasis. Congress, in its Amendment of 1931, *supra,* did specifically include the sort of transfer now in

question, and it may be presumed that such inclusion will be upheld as to such transfers occurring after the effective date of the Amendment. But in the absence there of such inclusion, it seems to us that the decision of *May v. Heiner, supra,* and the three subsequent cases followed, upon one or the other of the two bases suggested.

We shall, therefore, proceed to show that the authorities recognize and dwell on this distinction between an estate and a succession tax: first, decisions by state courts; second, decisions by this Court; third, text writers.

(1) *The Distinction as recognized by State Courts.*

In *re Macky's Estate,* 46 Colo. 79, 102 Pac. 1075 (1909), the question was whether legacies to a Colorado city for building a hospital, and to the State University, were exempt from the Colorado inheritance tax. It was held that they were exempt. The case turned upon whether the Colorado tax was an estate tax, upon the right to transmit, in which case, no matter who the legatees or devisees were, the tax would lie, or whether it was an inheritance tax, upon the right to receive, in which case, if the legatees were agencies of the state government itself, they would be impliedly exempt, since the state does not tax itself. It was held that the latter viewpoint was correct. The court made a profound and exhaustive study of the nature of various kinds of death duties, and discussed their history, both in England, in the United States, and in the various states. Many cases are cited, quoted from, and analyzed.

The opinion is much too long to be reprinted *in extenso*. Only two short quotations from the opinion will be given:

> (102 Pac. 1077): "Here, then, are presented two classes of death duties; the one being the taxation of the interest which ceased with death, and which is upon the transmission of property. Into this class fall the probate duty and the estate duty, the burden of which is borne by the estate; the other class being the taxation of the interest to which a person has succeeded on the death, and which is upon the right to receive. Into this latter class fall the legacy and succession taxes, the burden of which is borne by the person beneficially interested, the legatee or successor in interest . . . "

> (102 Pac. 1079): "It must be borne in mind that the decisions are numerous wherein the nature of death duties are (sic) discussed generically only. Such decisions have in view the idea that the tax is not one on property, and to sustain that view treat the subject in a more general way, and hold that it is the right to dispose of or receive property by death that is the subject of taxation, without intending to be specific in the case. No decision has been pointed out to us wherein is discussed the specific nature of an inheritance or succession tax, as distinguished from that of a probate, estate, or transfer tax, but that it is held that an inheritance or succession tax is on the right to receive the property."

Re Hamlin, 226 N. Y. 407, 124 N. E. 4, 7 A. L. R. 701 (1919).

It was held that the Federal Estate Tax fell upon the residuary, and not upon the particular, legatees.

For this holding, it was necessary to analyze the nature of the Federal Estate Tax. On this point the court said (7 A. L. R. 704):

> "The validity and interpretation of the (Federal) law of 1898 was the subject of consideration by the United States Supreme Court. *Knowlton v. Moore* 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747. Mr. Justice White, writing for the court, reviewed at length the history of laws imposing death duties, impost and excise taxes, and various acts of the Congress in the enactment of revenue laws, and fully treated of the distinction between a tax imposed on the whole personal estate and a tax laid upon legacies or distributive shares, concluding that under the (Federal) law of 1898, the validity of which was sustained, the tax therein provided for was not upon the whole estate of a decedent, but was one imposed upon particular legacies or distributive shares.
>
> "In 1916, when the Congress was again confronted with the necessity of providing revenue, we may assume that the framers of a proposed law would, in the first instance, recall the law of 1898, and the decision of the United States Supreme Court in the Knowlton case, to the end that any proposed legislation should be within constitutional limitations and consonant with the decision of the court. Had the Congress of 1916 intended to impose a tax upon legacies or distributive shares, the task would be lightened by practically following the Act of 1898, as construed by the court, with any changes deemed advisable in the rate of the tax imposed. That the Congress did intend, by the law of 1916, to impose a tax on the net value of the estate of a decedent at a flat rate dependent upon the

amount of the same, rather than upon legatees or distributees, is evident by a comparison of the Act of 1916 with the Act of 1898 . . . (The court then proceeds to compare them in detail).

" . . . As bearing upon the intention of the legislature of this state in the enactment of a statute, we may consider such historical or other facts as are reasonably within the scope of judicial cognizance . . . It is also permissible in an interpretation of an act of Congress to refer to the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, under proper qualifications . . . Within the limitations of the rules prescribed, an examination of the records of the Congress discloses the following facts: The House of Representatives' Bill (No. 16,763) was referred to the committee on ways and means, of which Mr. Kitchin was chairman. On July 5, 1916, the committee on ways and means through its chairman reported the bill to the House of Representatives (Report No. 922, 64th Congress, 1st Session), and recommended that the bill do pass. The report of the Committee under the heading 'Estate Tax' reads:

'Thirty states have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other states have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal Estate tax upon the transfer of the net estate, rather than upon the shares passing to heirs and distributees or devisees and legatees. The Federal estate tax recommended forms a well-balanced system of inheritance taxation as between the Federal government and the various

states, and the same can be readily administered with less conflict than a tax based upon the shares.'

"On July 6th, when the proposed measure was under consideration in the committee of the whole, while Mr. Kitchin, the chairman of the ways and means committee, was explaining the nature of the estate tax, he was asked by a member of the House if he recalled how the proposed tax rate compared with the inheritance tax rates in the state of New York, to which inquiry Mr. Kitchin replied: 'No, I do not know. We levy an entirely different system of inheritance taxes. We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal government, through the Treasury Department, going into the courts contesting and construing wills and statutes of Distribution'.

"On August 16th, while the bill (H. R. 16, 763), having passed the House of Representatives, was in the Senate, the committee on finance, through Senator Simmons, made a report thereon to the Senate, in the course of which he stated:

'The report of the committee on ways and means of the House of Representatives states with such clearness, ability and sufficiency the reasons for raising this additional revenue by impositions upon incomes, inheritances, and munitions of war that your committee contents itself with incorporating in its report that part of the report of the ways and means committee dealing with this subject'.

> "Then follows, under the head of 'Estate Tax', the language already quoted from the report made by Mr. Kitchin from the committee on ways and means. Senate Report No. 793, part 1, 64th Congress, 1st Session . . .
>
> "The plain intent and obvious meaning of the act of Congress under consideration, especially when considered in connection with the facts surrounding the enactment of the same, indicate clearly that the act imposes an 'estate tax' as distinguished from an inheritance tax, that the tax is payable by the estate rather than by the legatees . . . "

Exactly the same rule was upheld in *Plunkett v. Old Colony Trust Company,* 233 Mass. 471, 124 N. E. 265, 7 A. L. R. 696 (1919, decided shortly after *Re Hamlin, supra,* and referring to it). The Massachusetts court quoted the same words of Mr. Kitchin, in his report as chairman of the ways and means committee, and refers especially to *Knowlton v. Moore,* 178 U. S. 41, 49.

The same position with regard to the Federal estate tax was taken in *Corbin v. Townshend,* 92 Conn. 501, 103 Atl. 647 (1918), where it was said (p. 505),

> "The inheritance taxes due the State of Connecticut are measured by the amount of property passing to the beneficiary, which is his share of the net estate ascertained in the manner specified in sec. 5 of the Act . . . The Federal tax under the Revenue Act approved September 8th, 1916, . . . and amended March 3rd, 1917, imposes . . . a tax 'upon the transfer of the net estate' of every decedent dying after the passage of the Act. It is an estate tax levied

on the entire estate, less a named exemption and certain designated deductions, without reference to the extent of beneficiaries. By sec. 208 the intent of the Act is expressed to be, so far as is practicable and unless otherwise directed by the will of the decedent, that 'the tax shall be paid out of the estate before its distribution'. The Federal Act of 1916 imposes a tax payable out of the estate before its distribution, thus differing from the Federal inheritance tax of 1908 *(sic)*, payable by the individual beneficiaries. It is not a tax upon specific legacies nor upon residuary legatees. It is taken from the net estate 'before the distributive shares are determined rather than off the distributive shares' . . . It is an obligation against the estate, and payable like any expense which falls under the head of administration expenses."

See also *In re Corbin's Estate,* 107 Wash. 424 (1919) 181 Pac. 910;
Commonwealth v. Carter, 126 Va. 469 (1920) 102 S. E. 58;
Commonwealth v. Patterson, 127 Va. 14 (1920) 102 S. E. 569;
People v. Bemis, 68 Colo. 48, 189 Pac. 32 (1920);
State v. First Calumet Trust & Savings Bank, 71 Ind. App. 467 (1919) 125 N. E. 200;
State v. Alston, 94 Tenn. 680, 30 S. W. 750 (1895);
Gelsthorpe v. Furnell, 26 Mont. 305, 51 Pac. 267 (1897).

(2) *The Distinction as recognized by the United States Supreme Court.*

We now turn to the Federal cases, and observe that the same distinction between an estate tax and an in-

heritance tax is perceived and followed in the Federal courts, especially in those cases in which this Court has had occasion to consider the subject profoundly. Some cases may exist in which the question was not important and in which, therefore, the distinction was slurred over; but we think it will be apparent from the cases hereafter cited that this Court perceives and acts on the distinction whenever the case raises the question. The leading Federal case on this subject has already been mentioned: *Knowlton v. Moore,* 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747 (1900). It will be remembered that that case involved the Federal death tax of 1898, the validity of which was sustained, and which was held to be an inheritance tax, not an estate tax. Mr. Justice (later Chief Justice) White, writing for a majority of the court, went at length into the history of death duties, both in this country and abroad. The opinion is most detailed, scholarly and accurate. See especially pp. 46, et seq.

Knowlton v. Moore dealt, to be sure, with the 1898 Federal death tax, whereas our primary interest is with the 1916 Federal death tax, as amended, since it is upon the 1916 tax law that certain cases were decided in this Court, which form the basis for the present attack upon the Connecticut inheritance tax law. We therefore turn to expressions of this Court in fairly recent cases having to do with the Federal estate tax of 1916, or as subsequently amended, which expressions show that the distinction between estate and inheritance taxes is just as vivid to this Court today as it was when *Knowlton v. Moore* was decided, or as it is today to various state courts.

The constitutionality of the Federal estate tax of 1916 was attacked as a whole in *New York Trust Co. v. Eisner,* 256 U. S. 345 (1921). The law as a whole was sustained. Mr. Justice Holmes, in delivering the opinion of the unanimous court, did not treat of the distinction, except incidentally, with a reference to *Knowlton v. Moore, supra.*

In *Young Men's Christian Association of Columbus v. Davis,* 264 U. S. 47 (1924), the question was whether the Federal estate tax, being paid out of the residue, must be paid by the residuary legatees, which were charitable institutions specifically exempt from the tax. It was held that it must: Mr. Chief Justice Taft said (264 U. S. 50):

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded upon death, but the interest which ceased by reason of the death."

In *Edwards v. Slocum,* 264 U. S. 61 (1924), a case dealing with the Federal excise tax, Mr. Justice Holmes said (264 U. S. 62):

> "But this is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton v. Moore,* 178 U. S. 41, 49, 77. It comes into existence before and is independent of the receipt of

> the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death'."

The case of *Saltonstall v. Saltonstall,* 276 U. S. 260 (1928) was concerned with the taxability of a certain gift under the provisions of the Massachusetts succession tax law. The tax was upheld. Mr. Justice Stone, writing the opinion for a unanimous court, said (276 U. S. 270):

> " . . . the estate tax provisions of the Federal Revenue Act of 1919 . . . tax the privilege of transmission . . . But we are here concerned, not with a tax on the privilege of transmission, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of, . . . but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the state whether occasioned by death, *Stebbins v. Riley,* 268 U. S. 137, or effected by deed, *Keeney v. New York,* 222 U. S. 525; *Chanler v. Kelsey,* 205 U. S. 466, *Nickel v. Cole,* 256 U. S. 222. The present tax is not laid on the donor, but on the beneficiary . . . So long as the privilege of succession has not been fully exercised it may be reached by the tax . . . And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices."

In *Chase National Bank v. United States,* 278 U. S. 327 (1928), the question was whether the proceeds of certain insurance policies on the life of decedent were properly included in the net estate subject to Federal estate tax. This Court held that they were, and referred to *Saltonstall v. Saltonstall, supra,* quoting at some length from the opinion in that case. The court then said (278 U. S. 336):

> "That (the quotation from *Saltonstall v. Saltonstall),* it is true, was said of a succession tax, and we are here concerned with a transfer tax. The distinction was there important . . "

In *Ithaca Trust Co. v. United States,* 279 U. S. 151 (1929), a case which dealt with one phase of the Federal estate tax, Mr. Justice Holmes, writing for the unanimous court, said (279 U. S. 155):

> "The tax is on the act of the testator, not on the receipt of property by the legatees."

Other cases involving various phases of the Federal estate tax have been before this Court; in all of them the court has reaffirmed its position that the tax is upon the transfer from the decedent occurring at his death; but we do not cite them in this portion of the brief, since they did not find it necessary to dwell upon the distinction between an estate and a succession tax. We have found no case in which this Court ignored the distinction, where the question was fairly raised.

(3). *The Distinction as Recognized by Text Writers.*

The authors of the leading text-book, *Gleason & Otis on Inheritance Taxation,* 4th Edition (1925), have much to say about the Federal estate tax and the distinction between it and state inheritance or succession taxes. A basic distinction, such as this, results in manifold differences of treatment of minor similar phases of the two kinds of taxes. It is not thought necessary to treat here of these minor differences, so long as the main difference can be brought out.

The text book above cited says, at the very start, on page 2 et seq.:

> "In the first three editions of this work the Federal Estate Tax has been treated as part and parcel of the general scheme of inheritance taxation; but the development of the law, as construed by the United States Supreme Court and the various subordinate jurisdictions, as well as the trend of the recent amendments, have made it clear that the consideration of its provisions belongs in a class by itself. This has been more emphatically demonstrated by the enactment of the Federal Gift Tax, included in the United States Internal Revenue Act of 1924 (since repealed) . . .
>
> "All of the state taxes deal with transfers which take effect by reason of death or made in contemplation of death; but in some very essential aspects the Federal Estate Tax, even before it was supplemented, as now, by the Gift Tax, affects a man's estate before his death. As Justice Taft frankly puts it, 'Congress is in reality dealing with the testator before his death,' *Y. M. C. A. v. Davis,* 264 U. S. 47. And a testator must be alive when he makes his will!

"Even prior to the Gift Tax, the Federal Estate Tax was imposed upon gifts to take effect at or after death and gifts in contemplation of death, and any gift made within two years before death is presumed to be made in contemplation thereof, though this presumption is not conclusive.

"These provisions were copied from the state statutes, to be sure, but as Congress is dealing with the estate of a decedent and not with the beneficiary, it is providing that such an estate shall consist of sums which are no longer there, while the tax must be paid out of money actually in the hands of the executor, the adjustment of the burden of the tax being left to the State courts . . .

"With few exceptions the State inheritance tax statutes levy a duty or excise upon the beneficiary for the privilege or right of receiving property from the dead either by will or the intestate law. Even where the transfer is taxed because it was made in contemplation of death or to take effect at death, these statutes tax the beneficiary and not the estate of the decedent. On the other hand, it is the theory of the Federal Estate Tax that such transfers are to be regarded as part of the estate and the tax thereon must be paid by the executor without recourse to the beneficiary."

Professor Henry Rottschaefer, in his profound and scholarly article in 14 Minnesota Law Review (April and May, 1930), divides his discussion of the taxability of transfers intended to take effect at death, into two parts, one part dealing with the problem under state inheritance tax acts, the other part dealing with the

problem under the Federal estate tax. Coming to the latter subject, he commences by saying (page 625):

> "The Federal estate tax is levied on the transfer of the net estate of a decedent. The net estate is defined as the gross estate less specified deductions. Among the items includible in the gross estate is property to the extent of any interest therein of which the decedent has during his life made a transfer or created a trust, intended to take effect in possession or enjoyment at or after his death. The tax is generally held to be on the transfer of, rather than on the succession to, property of the decedent. It taxes not the interest to which some person succeeds on a death, but on the interest which ceases by reason of the death."

He then proceeds (page 628, et seq.):

> "The case in which a donor has transferred property, reserving an estate for his own life, is one that has been frequently passed on. The decisions under state inheritance tax statutes are unanimous that this is a transfer intended to take effect in possession or enjoyment at the donor's death. If, then, this language in the federal estate tax act describes the same fact situations described by the same expression in the state statutes, then would the property thus disposed of have to be treated as part of the donor's gross estate. It has been held a part thereof in most cases. It was so held in one case on the theory that this was in substance such a post-mortem disposition of the property as the statute was intended to tax. The decision in another case was based on the reasoning that the donor, by reserving the income for his life, retained an interest in the property until his death, that it was ony then that the transaction was fully completed, and that the beneficiaries acquired

no benefits until that time. The fact that the interest of the remainderman was technically vested prior to the donor's death is immaterial since the tax question does not depend for its answer on such considerations. There have, however, been contrary decisions. One of these rested on the theory that the donor had by the transfer completely divested himself of the title to the property, and that, therefore, the fact that the beneficiaries were postponed until his death, as far as the actual enjoyment of the property was concerned, was immaterial. Another adopts the position that property can be held to have been disposed of by a transfer intended, etc., so as to be includible in the gross estate, only if the transfer remains incomplete up to the time of the donor's death. It purports to derive this test from *Nichols v. Coolidge, Reinecke v. Northern Trust Co.,* and *Chase National Bank v. United States.* The importance attached by the last two of these cases to the shifting of economic interests is rather an argument against than for such views. It is undeniable that a donor who transfers property with a reservation of a life estate or right to the income for his own life retains the most important economic interest therein until his death, and that that interest is furthermore either a legal or equitable estate in the property. If the purpose is to include in the gross estate the property interests retained by the decedent until his death, and the property whose economic benefits he enjoyed until that time, there is every reason for including property disposed of during his life by a transfer under which he reserved a life interest in the thing transferred. It is of course true that, in a technical sense, his interest does not pass at his death, but his death is the event on whose occurrence like benefits shift to the remainderman. The cases first discussed should, therefore, be

considered as correctly stating the law on this matter . . . "

It must be remembered that Professor Rottschaefer wrote this article before the decisions in *May v. Heiner* and the later cases were handed down by this Court; but we do not believe that the validity of his conclusions with respect to the scope of the Federal estate tax is thereby impaired. We are not, to be sure, primarily interested in the exact scope of the Federal estate tax, and even if his conclusions with respect to that tax are unsound, we do not for a moment concede that that would affect the scope of a succession tax. However, since the subjects are sufficiently interrelated so that we are obliged to deal with both sorts of taxes, we have, in another part of this brief, attempted to show that *May v. Heiner* and the later cases in this Court do not in any way conflict with the "shifting of economic interests" theory upon which both this Court and Professor Rottschaefer largely rest. In *May v. Heiner,* settlor retained no important economic interests, and the later cases *(Morsman v. Commissioner, McCormick v. Commissioner,* and *Commissioner v. Northern Trust Co., supra)* went off on the technical ground of what Congress intended, and not on the substantial question. The intention of Congress was made plain within two days thereafter, by an amendment to the Federal law; and there the matter rests at present.

See, also, *Cooley on Taxation,* Fourth Edition, Vol. 4, Sec. 1722.

IV.

RECENT STATE DECISIONS.

Since the decision of *May v. Heiner, supra,* the highest courts of Massachusetts, New York, Minnesota, Ohio, Wisconsin and Washington have rendered decisions in conformity with that of the court below in the case at bar. This is enough to show that state courts, in deciding this question with respect to state succession taxes, do not consider that the constitutionality of death taxation of "gifts intended" has been adversely decided by this Court.

The Massachusetts case is *Worcester County National Bank v. Commissioner of Corporations and Taxation* (decided April 10, 1931), 275 Mass. 216, 175 N. E. 726. It is to be especially noted that this Massachusetts decision was made after and with special reference to *May v. Heiner* and the three subsequent decisions. In this case, the settlor created a trust in 1919 (after the passage of the taxing statute which contained the phrase "gifts intended" etc.), which trust was irrevocable, and wherein the settlor reserved to himself the life use, with remainder over after his death to his prospective wife. Settlor died in 1927. The Court said (175 N. E. 728):

> "*First.* The property held by the petitioner under the trust indenture passed 'by deed, grant or gift—made or intended to take effect in possession or enjoyment after . . . (the) death' of the decedent, within the meaning of the statute.

"The transaction was within the description of the statute. The property passed from the decedent to the beneficiary 'by deed, grant or gift'. Though upon the creation of the trust an equitable remainder in the trust fund, after the life estate of the decedent in such fund, vested in interest in the beneficiary, she was not entitled to 'possession or enjoyment' of the fund or any part of it until the death of the decedent. The 'deed, grant or gift' was 'intended to take effect in possession or enjoyment after his death'. Her present right to the future 'possession or enjoyment' of the trust fund, which was 'vested' in the sense of being assignable and transmissible by her during the life of the decedent (see *Nickerson v. Harding,* 267 Mass. 203, 207), was not 'possession or enjoyment', within the meaning of the statute. The statute recognizes the familiar distinction between taking effect in possession or enjoyment and vesting in right, title or interest. *State Street Trust Co. v. Treasurer and Receiver General,* 209 Mass. 373, 378. *Pratt v. Dean,* 246 Mass. 300, 307-308. *Saltonstall v. Treasurer and Receiver General,* 256 Mass. 519, 523-525; s.c. 276 U. S. 260, 269-270. See also *Magee v. Commissioner of Corporations and Taxation,* 268 Mass. 443, 450-451; *United States v. Fidelity Trust Co.,* 222 U. S. 158, 168. Apparently the Legislature intended to reach for the purpose of taxation the shifting of the enjoyment of property—the 'economic benefits' thereof or 'economic interest' therein (compare *Saltonstall v. Saltonstall,* 276 U. S. 260, 271; *Reinecke v. Northern Trust Co.,* 278 U. S. 339-346)—from a former owner at his death, even though such shifting of enjoyment followed necessarily from a prior transfer of title inter vivos. As was said in *State Street Trust Co. v. Treasurer and Receiver General,* 209 Mass. 373, 379, 'The policy of the law is, that the owner of

property shall not defeat or evade the tax by any from of conveyance or transfer, where after death the income, profit or enjoyment enures to the benefit of those who are not exempted'. The decision in *Dexter v. Treasurer and Receiver General,* 243 Mass. 523, is not in conflict with this interpretation of the statute for as a result of the transfer considered in that case enjoyment of the property in question shifted before the death of the former owner. 'The possession and enjoyment vested in the beneficiaries when the trust deed was delivered to the trustees'. (Page 527). See also *Shukert v. Allen,* 273 U. S. 545; *Reinecke v. Northern Trust Co.,* 278 U. S. 339. The cases of *May v. Heiner,* 281 U. S. 538, and *McCaughn v. Carnill,* 43 Fed. Rep. (2nd) 69, relied on by the petitioner, deal with the construction of Federal statutes imposing estate taxes and are distinguishable because of the terms of those statutes, if not on other grounds. See *Milliken v. United States,* United States Supreme Court, decided March 2, 1931. (Page 2.) *Coolidge v. Long,* United States Supreme Court, decided February 24, 1931, is distinguishable in its facts."

The New York case is *Matter of Barstow,* 253 N. Y. 123, 177 N. E. 177, (May 22, 1931).

Testatrix during her lifetime executed a trust agreement whereby she reserved to herself, during her life, the income arising therefrom, and directed, upon her death, that one-half of the income be paid to each of her two daughters. Upon the death of either daughter the income of the entire fund was to go to the survivor for life, and upon the death of both the principal was to be paid to remaindermen. The only question was

whether the transfer should be taxed under the law in effect at the date of the death of the donor or at the date of the execution of the instrument. The Appellate Division held that the latter was the proper basis. This was affirmed without opinion by the Court of Appeals.

This, too, is a square decision in our favor, to the effect that a state may levy an inheritance or succession tax with respect to the transfer of property under an irrevocable trust wherein the settlor reserved a life use to himself, with remainders over after his death. It is to be noted that this case was decided after *May v. Heiner* and after *Morsman v. Commissioner, McCormick v. Commissioner,* and *Commissioner v. Northern Trust Co., supra,* and presumably with reference to them, although they were not mentioned, since the New York Court of Appeals affirmed without opinion.

The other decisions mentioned above are:

1. *Rising v. State,* 242 N. W. 459 (Minn. Apr. 22, 1932).
2. *Sherman v. Tax Commission of Ohio,* 181 N. E. 539 (Ohio, June 1, 1932).
3. *Ogden v. Milwaukee,* (Prentice Hall Inheritance Tax Service 1932, Wisconsin Section, Par. 1117, Supreme Court of Wisconsin, October 11, 1932).
4. *Re Estate of Addie M. Hall Ellis, State of Washington v. Edith Moore Suzzalo, et al, executors,* 14 Pac. (2nd) 37 (Washington, September 20, 1932).

No more comment is required, except to point out two sentences from the majority opinion in *Coolidge v. Long,* 282 U. S. 582, which sentences, if not *obiter,* we respectfully submit are decisive of the questions now before this Court. Mr. Justice Butler, writing for the majority of this Court said (282 U. S. 596):

> "In its opinion, the state court (i.e., the Supreme Court of Massachusetts, in deciding *Coolidge v. Long* below) suggests that the Federal Estate Tax was upon property of the deceased transferred at his death and that it was levied upon a subject quite different from the succession to property by a beneficiary which is the subject of the present excise. *Undoubtedly the state has power to lay such an excise upon property so passing after the taking effect of the taxing act.*" (Italics Ours)

V.

APPELLANT'S CLAIMS OF UNCONSTITUTIONALITY.

1. In General.

In what we have said, we have attempted to show that reason and authority unite in upholding the rule that an irrevocable trust, reserving the life use to settlor, is properly subject to succession tax, so long as no retroactive effect is given to the statute. Because the question has been so much litigated and discussed, it would seem as if every possible constitutional objection to the imposition of such tax must already have been brought forward and repelled. But such an assumption is only by way of implication; and since the appellant in the case at bar raises and urges certain constitutional claims, we deem it necessary to meet them squarely.

These claims are based, respectively, upon the due process clause, the equal protection clause and the impairment of contract clause.

2. Due Process.

The claim is made that Connecticut cannot, consistently with the due process clause, levy a death tax on a transfer such as this, under the guise of including it as a "gift intended", because the interests vested absolutely in the donee or transferee long before the death of the donor. The scope of the due process clause is broad, but as we understand it, it requires (a) that the taxpayer be given opportunity to appear and be

heard before some adequate tribunal concerning the proposed imposition of the tax. That certainly is the case here. (b) That no retroactive effect is given to the tax. But here the statute was in effect before the transfer was executed, so that no claim can be made on this ground. (c) That the subject of the tax (what the Massachusetts Supreme Court calls the "commodity" taxed) was within the jurisdiction of the State. Here the subject of the transfer was all intangible personalty (R. 10-20), and it is well settled (*Blodgett v. Silberman*, 277 U. S. 1) that that has its situs, for death tax purposes, at the domicile of the owner. The owner (the settlor) was domiciled in Connecticut (R. 3). And it is too well settled to require the citation of authority that, in general, a state may levy a death tax with respect to the intangible personalty of persons who die domiciled therein.

Appellant's claim under this head, therefore, comes down to this: that granting all the above, this transfer was of a peculiar sort which could not be reached by a death tax (by whatever name it might be called), because here nothing passed from the decedent at death upon which a death tax could be based. This is the estate tax argument. No decisions of this Court support it, and, as we have attempted to show, its vice consists in concentrating upon the technical aspects of title and in ignoring the fact that possession and enjoyment of the fund did change at the settlor's death, that new and larger interests in the property (especially as to the income, as the chief economic benefit thereof) were acquired by the remaindermen at, and not before, the settlor's death.

Mr. Justice Roberts said, in the dissenting opinion in *Coolidge v. Long, supra,* 282 U. S. 582, at page 624:

> "Notwithstanding the distinction between a transfer (estate) tax and a succession tax, the decisions under the federal estate tax statutes . . . are convincing on the matter of substantiality as against technicality. The court has uniformly disregarded the technical aspect of a transfer and looked at the reality and substance of a transaction".

In *Keeney v. New York, supra,* 222 U. S. 535 (1912) it was argued, as to the due process clause, that such a statute was radically different from a true inheritance tax, and was in reality a tax on property. This argument was repelled, the Court saying (p. 533):

> "There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed to take effect at death have frequently been classed with death duties, legacy and inheritance taxes . . . An excise on transfers, therefore, does not lose that character because the amount to be paid is determined by the values conveyed".

In *Moffitt v. Kelly,* 218 U. S. 400 (1910), the facts were these: Moffitt married in California in 1863 and resided there with his wife until his death in 1906. By his will he gave his estate to his wife and children as if he had died intestate. The probate court held that

his widow's interest in the marital community was within the provisions of a California law, passed in 1905, taxing all devolutions of property by will or intestacy. The question was, therefore, whether a surviving wife was liable for a tax, which, as applied, could only be incident to her coming into untrammeled possession and enjoyment of what she had technically owned prior to the passage of the taxing statute. The supreme court of California held the tax valid against her insistence that this was a violation of the contract clause, the due process clause and the equal protection clause of the Federal Constitution. This Court unanimously sustained the judgment and, by Mr. Justice White, said (p. 403):

> "But in every conceivable aspect the proposition must rest upon one or both of two theories, either that the nature and character of the right or interest was such that the State could not tax it without violating the Constitution of the United States, or that if it could be generically taxed without violating that instrument, for some particular reason the otherwise valid state power of taxation could not be exerted without violating the Constitution of the United States. The first conception is at once disposed of by saying that it is elementary that the Constitution of the United States does not, generally speaking, control the power of the states to select and classify subjects of taxation, and hence, even although the wife's right in the community property was a vested right which could not be impaired by subsequent legislation, it was, nevertheless, within the power of the State, without violating the Constitution of the United States, in selecting objects of taxation, to select the vesting in complete pos-

session and enjoyment by wives of their share in community property consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof. And this also disposes of the second conception, since if the State had the power, so far as the Constitution of the United States was concerned, to select the vesting of such right to possession and enjoyment as a subject of taxation, clearly the mere fact that the wife had a pre-existing right to the property created no exemption from taxation if the selection for taxation would be otherwise legal. It follows, therefore, that the mere statement of the contention demonstrates the mistaken conception upon which, in the nature of things, it rests.

"It is said, however, that the reasoning just stated, while it may be abstractly sound, is here inapplicable, because the thing complained of in this case is that the State of California has imposed an inheritance tax upon the share of the wife in the community and thereby taxed her as an heir of her husband, when if the laws existing at the time of the celebration of the marriage be properly construed and be held to be contractual she took her share of the property on her husband's death, not as an heir to property of which he was the owner, but by virtue of a right of ownership vested in her prior to the death of the husband, although the right to possess and enjoy such property was deferred and arose only on his death. But for the purpose of enforcing the Constitution of the United States, we are not concerned with the mere designation affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been mistakenly brought within the state taxing law. We say so because in de-

> termining whether the imposition of the tax complained of violated the Constitution of the United States, we are solely confined to considering whether the state had the lawful power, without violating the Constitution of the United States, to levy a tax upon the subject or thing taxed. This being true, as it clearly results from what we have said that the vesting of the wife's possession and enjoyment arising upon the death of her husband was subject to be taxed by the State, so far as the Constitution of the United States was concerned, it follows that whether the tax imposed was designated or levied as an inheritance tax or any other is a matter with which we have no concern".

Commenting upon this decision, Mr. Justice Roberts, speaking for the minority of the court in *Coolidge v. Long, supra,* says (282 U. S. 622):

> "Whatever may be said of the nature of the wife's interest in community property, this decision assumes the wife's vested interest in her half thereof; and that its free and unencumbered enjoyment only was postponed to the husband's death. There can be no difference in legal effect between that situation and one presented by the division of the total interest in a given property into a life tenancy and a remainder."

While Mr. Justice Roberts cited and commented upon *Moffitt v. Kelly* in support of the proposition that an inheritance tax could be levied upon a transfer in trust wherein the life use was reserved to the settlor, if the latter died after the passage of the taxing statute though the trust was irrevocably executed before such passage—a proposition which was disapproved of by the majority of the court and the matter decided other-

wise—yet it seems to us that, *mutatis mutandis,* the remarks of this court in *Moffitt v. Kelly,* and Mr. Justice Roberts' comments thereon, are applicable to the case at bar, and show that the Constitution of the United States does not prohibit Connecticut from selecting as a subject of taxation the "vesting in complete possession and enjoyment" of a remainderman's interest in an irrevocable trust upon the death of the settlor, provided no retroactive effect is attempted to be given to the taxing law; and, further, that it is no concern of this Court what the state tax is called.

3. Equal Protection.

As to the equal protection clause, appellant's claim is that this transfer was a gift *inter vivos* and that to levy a tax on it (under the pretense of a death tax) while omitting to tax other sorts of *inter vivos* gifts, is unfair discrimination or classification. But Connecticut, like all other jurisdictions, does tax gifts in contemplation of death, which are truly *inter vivos* gifts; and these two sorts of gifts are properly singled out for special treatment since they sufficiently resemble devolutions by will or by intestacy, *Milliken v. United States, supra,* 283 U. S. 15 (1931). The words of this Court in *Moffitt v. Kelly, supra,* 218 U. S. 400 (1910) are likewise applicable here.

In *Keeney v. New York,* supra, 222 U. S. 525 (1912), it was argued, as to the equal protection clause, that the tax was arbitrary and discriminatory (a) because it was an unreasonable classification, since no othe taxes were levied on *inter vivos* gifts, and (b) be-

cause it was assessed at gaduated rates. Both of these arguments were likewise repelled, the court saying, as to (a): (p. 535)

> "The validity of the tax must be determined by the laws of New York. The 14th Amendment does not diminish the taxing power of the State, but only requires that, in its exercise, the citizen must be afforded an opportunity to be heard on all questions of liability and value, and shall not, by arbitary and discriminatory provisions, be denied equal protection. But it does not follow that because it can tax any transfer . . . that it must tax all transfers, or that all must be treated alike . . .
>
> "There can be no arbitrary and unreasonable discrimination. But when there is a difference, it need not be great or conspicuous in order to warrant classification. In the present instance, and so far as the 14th Amendment is concerned, the state could put the transfers intended to take effect at the death of the grantor in a class with transfers by descent, will, or gifts in contemplation of the death of the donor, without, at the same time, taxing transfers intended to take effect on the death of some person other than the grantor, or on the happening of a certain or contingent event."

And moreover to call this transfer a gift *inter vivos,* as the appellant does, is to assume the point in question; it is to assume that the gift was wholly completed, in all of its aspects before settlor's death, whereas our chief contention is that it was not completed, so far as possession and enjoyment of the income in the remaindermen was concerned, until at or after her death.

In *Milliken v. United States, supra,* 283 U. S. 15 (1931), the 1916 Federal Estate Tax law taxed gifts in contemplation of death. In that year decedent, in contemplation of death, made an outright gift of stock to his children. The donor died after the enactment of the 1928 Act, which also taxed gifts in contemplation of death, but at higher rates, whether or not the gift was made before or after the enactment of the law. The gift was taxed at the 1928 rates, on the value at the date of death. This Court sustained the assessment unanimously. The chief claim of the taxpayer, as stated by this Court, was lack of due process (283 U. S. 20).

> "It is said that the statute is invalid not alone because it reaches a gift made before its enactment, but because it measures the tax by rates not in force when the gift was made, applied to the value of the property not when given, but at the uncertain later time of the death of the owner."

This Court dismissed this argument saying in part (283 U. S. 23):

> "Not only was the decedent left in no uncertainty that the gift he was then making was subject to the provisions of the existing statute, but in view of its well-understood purpose, he should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation under which substitutes for testamentary gifts were classed and taxed with them."

> "Further, as an appropriate and indeed necessary measure to secure the effective administration of a system of death taxes, we think the present tax is to be supported as an incident and

in aid of the exercise of the constitutional power to levy a tax on the transfer of the decedent's estate at death."

Tyler v. United States, 281 U. S. 497 (1930).

The Federal Estate Tax in terms includes in the gross estate property "to the extent of the interest therein held jointly or as tenants by the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other persons and never to have belonged to the decedent."

The sole question involved was the constitutionality of the tax.

This Court held that the tax was valid, saying (p. 503):

> "The question here, then, is not whether there has been in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty, or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.
>
> "The attack upon the taxing act as constituting a violation of the Fifth Amendment is wholly without merit. The point made is that the tax is so arbitrary and capricious as to amount to confiscation, and, therefore, to result in a depriva-

tion of property without due process of law. The tax, as we have just held, falls within the power of taxation granted to Congress, and the challenge becomes one not to the power, but to an abuse of it. The possibility that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment must be conceded—*Brushaber v. Union Pacific R. R.*, 240 U. S. 1, 24 and cases cited, *Nichols v. Coolidge*, 274 U. S. 531, 542—but the present statute is not of that character. To include in the gross estate, for the purpose of measuring the tax, the value of property, no part of which originally belonged to one spouse, but which came to the tenancy, mediately or immediately, as a pure gift from the other, and which, as a consequence of the latter's death, was relieved from restrictions imposed by the law in respect of tenancy by the entirety so as to produce in the survivor the right of sole proprietorship, is obviously neither arbitrary nor capricious. The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end."

In *Klein v. United States*, 283 U. S. 231 (1931), it was said in another connection—but the words are applicable here:

(page 234) " . . . It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its

transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed."

4. Impairment of Contract.

Under the impairment of contract clause, a claim is made by appellant which is difficult to summarize, since it is based on two erroneous assumptions. It seems to be (a) that the tax was not sustainable under the 1923 act; (b) that since the court below upheld the tax it must have relied upon some other act; (c) that the only applicable act was the 1929 act; (d) but that that act could not be applied to the present transfer since to do so would involve unconstitutional retroactivity, although the act could be applied prospectively. But the Tax Commissioner, appellee herein, has never made, either to the court below or to this Court, any claim that the 1929 act governed the situation. Our whole brief has been directed to showing that the 1923 act applies. We are content to stand or fall upon that. It is respectfully submitted that appellant is erroneous in claiming that the 1923 act cannot apply and in claiming that the court below applied some other act. There can be no question, in view of the opinion of the court below and of the questions which were asked and answered, which act it relied on. It was aware of the 1929 act, but mentioned it only once, near the beginning of its opinion (R. 26), and the purpose of that one mention was merely historical, to show that the phrase "gift intended" remained constantly in the Connecticut succession tax laws from 1915 to date.

And in fact the 1929 act cannot now be drawn in question. It clearly appears from the Record that the 1923 act was the only one considered or applied by the court below. See the Certificate of the Chief Justice of the Connecticut Supreme Court of Errors (R. 45, 46); Appellant's Assignments of Error (R. 44, 45); Appellant's Petition for Leave to Appeal (R. 43); The Judgment appealed from (R. 39); and the opinion of the court below (R. 36, 37). In the face of this, it is now too late for appellant to seek to drag in another statute or to claim that such other statute was "really" applied if such were the case, which it is not. But we do not propose to argue this further.

VI.

CONCLUSION

We have attempted to show

(1) That the power of a state prospectively to levy a succession tax upon such a transfer has been unanimously upheld by state courts. This involves, likewise, the holding that the legisature intended to tax such a transfer, by the words used.

(2) That this ruling has been approved, if not squarely affirmed, by this Court *(Nickel v. Cole, supra, Keeney v. New York, supra).*

(3). That reason, as well as authority, upholds such a tax as a just and necessary classification.

(4). That whatever may be said about an estate tax *(May v. Heiner, supra,* and the three later companion cases), such decisions do not affect the construction or scope of a succession tax in this regard.

(5). That there is nothing unconstitutional about the imposition of such a succession tax, either because of the due process clause, the equal protection clause, or the contract clause.

Wherefore, it is respectfully submitted that the decision below should be affirmed.

Respectfully submitted,

WILLIAM H. BLODGETT, *Tax Commissioner,*

By ERNEST L. AVERILL,
Deputy Attorney-General,

FARWELL KNAPP,
Assistant Tax Commissioner,
His Attorneys.

APPENDIX

CONNECTICUT PUBLIC ACTS, 1929, CHAPTER 299.

Section 1. Tax on transfers of property. A tax is imposed, under the conditions and subject to the exemptions and limitations hereinafter prescribed, upon transfers, in trust or otherwise, of the following property or any interest therein or income therefrom: (a) When the transfer is from a resident of this state; (1) real property situated in this state; (2) tangible personal property, except such as has an actual situs without this state; (3) all intangible personal property; (b) when the transfer is from a nonresident of this state; (1) real property situated in this state; (2) tangible personal property which has an actual situs in this state.

Section 2. Transfers taxable. The transfers enumerated in section one of this act shall be taxable if made: (a) by will; (b) by statutes relating to descent and distribution of property upon the death of the owner; (c) in contemplation of the death of the transferor, and any transfer of property between parties related by blood or marriage, either by a direct conveyance or by conveyances through a third party, made and completed within one year next prior to the date of death of the grantor or donor, shall, unless shown to the contrary, be construed prima facie to have been made in contemplation of death; (d) by gift or grant intended to take effect in possession or enjoyment at or after the death of the transferor. A transfer of property in respect of which the transferor reserves to himself a

life income or interest shall be construed prima facie to have been intended to take effect in possession or enjoyment at death; (e) in payment of a claim against the estate of a deceased person arising from a contract made by him and payable by its terms at or after his death, but a claim created by an ante-nuptial agreement made payable by will shall be considered as creating a debt against the estate and shall not constitute a taxable transfer; (f) if any transfer, specified in paragraphs (c), (d) and (e) of this section should be made for a valuable consideration, so much thereof as is the equivalent in money value of the money value of the consideration received by the transferor shall not be taxable, but the remaining portion shall be taxable. If it shall become necessary or appropriate in ascertaining such value to use mortality tables, the American Men's Ultimate Mortality Tables at four per centum compound interest, shall be used, so far as applicable. The provisions of this section shall not apply to any policy of life or accident insurance.

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CHARLES ELMORE CR

No. 217

In The

Supreme Court of the United States

October Term, 1932.

Guaranty Trust Company, Executor, Etc.,
Appellant,

vs.

William H. Blodgett, Tax Commissioner,
Appellee.

Appeal from the Superior Court of Fairfield County, Connecticut.

PETITION FOR REHEARING.

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Washington, D. C.,
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The Daily Record Co. Print, Baltimore.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

GUARANTY TRUST COMPANY, EXECUTOR, ETC.,
Appellant,

VS.

WILLIAM H. BLODGETT, TAX COMMISSIONER,
Appellee.

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

PETITION FOR REHEARING.

The appellant, Guaranty Trust Company of New York, petitions this Honorable Court for a rehearing in the above entitled cause, for the reason that the decision of the Court, rendered on January 9th last,* was based on a ground which had not been argued before the Court and which appellant, having relied on the previous decisions of this Court, reasonably assumed did not require argument.

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* The time for filing this petition was extended to February 18th, 1933, by Mr. Justice Stone, under Rule 33 of the Rules of this Court.

Major Premise Of Appellant's Argument.

In its argument before this Court, appellant assumed as its major premise that a TRANSFER THROUGH AN IRREVOCABLE TRUST, NOT MADE IN CONTEMPLATION OF DEATH, IS NOT TESTAMENTARY IN EFFECT, in other words, that the generating source of such transfer is not the death of the donor, but the deed of trust.

In support of this premise, appellant throughout its briefs relied on the decisions of this Court in *Coolidge v. Long,* 282 U. S. 582 and other cases. In his oral argument, counsel for appellant expressly stated with reference to this proposition: "I assume that it is not necessary to reargue the case of *Coolidge v. Long* or the cases which preceded it."

Reasons In Support Of The Petition For Rehearing.

In support of this petition for rehearing, appellant submits:—

(1) That the basis of the decision in this case under the 14th Amendment, namely, that "the tax was imposed upon an event generated by the death of the decedent", is not compatible with the decisions of this Court in *Coolidge v. Long* and the cases which preceded it.

(2) That the time of the passage of the taxing statute does not determine whether the event taxed takes its source in the death of the decedent or in the deed of trust transferring the property.

(3) That the retroactive application of the Massachusetts Inheritance Tax Statute in *Coolidge v. Long* was not the sole determining factor in holding that tax unconstitutional, and that if it were, the decision would have been inconsistent with prior decisions of this Court.

(4) That the question presented is far too important to be disposed of on the authority of a statement in a prior decision which is mere *dictum* and which is in conflict with the *ratio decidendi* of the same case. This Court, it is true, is not bound by its prior decisions, but when it finds it necessary to depart from its former views, the principles of certainty and stability in the law, as well as justice to the litigants, require that the Court state its reasons for reversing the former decision or for distinguishing the case at bar from those previously decided.

I.

The Decision Rendered On January 9th Is Incompatible With The Law As Established In Coolidge v. Long And Previous Cases.

That the basis of the decision in the present case is not compatible with *Coolidge v. Long, supra,* can best be illustrated by a tabular comparison between those elements in the two cases which have a bearing on the generating source of the event taxed. It will readily appear that although the elements or factors are the same, the conclusions reached are contrary. Both of them cannot be right.

GUARANTY TRUST CO. V. BLODGETT.	COOLIDGE V. LONG.
The Transfer.[1]	
Irrevocable trust reserving a life interest in the donor with remainders to others.	The same.

[1] Appellee apparently sought to establish a distinction between an irrevocable trust like that found in *Shukert v. Allen*, 273 U. S. 546 or *Reinecke v. Northern Trust Co.*, 278 U. S. 339 and one in which the settlor reserved a life interest. See also opinion of the court below which raises an absolute presumption of intent to have the transfer take effect in possession or enjoyment at death, where there is a reservation of a life interest (R. 27). Such distinction cannot be made in view of the fact that in *Coolidge v. Long* there was a reservation of a life interest. See also *Reinecke v. Northern Trust Co.*, supra, p. 347-8.

The Statute.[2]

"All property and any interest therein owned by a resident of this state at the time of his decease, * * * and all gifts of such property by deed, grant or other conveyance, * * * intended to take effect in possession or enjoyment at or after the death of such grantor or donor, shall be subject to the tax herein prescribed." (Interpreted to include transfers of property not owned at time of death, thus making the two statutes equivalent.)

"All property within the jurisdiction of the Commonwealth * * * which shall pass by * * * deed, grant or gift, made or intended to take effect in possession or enjoyment after his death * * * to any person, absolutely or in trust * * * shall be subject to the tax."

Nature of Tax as Interpreted by State Court.[3]

Tax imposed not on succession to the property upon death, but upon privilege of succeeding to the possession or enjoyment.

The same.

---

[2] For the purpose of this argument we accept as reasonable the supposed interpretation of the statute by the court below that the legislature intended to tax property beyond the interest of the decedent at the time of her death. With such an interpretation the two statutes are equivalent in the classes of transfers taxed.

[3] Compare (R. 27) with the statement of the Supreme Judicial Court of Massachusetts, 268 Mass. 443, 447, 448, 449.

GUARANTY TRUST CO. V. BLODGETT.	COOLIDGE V. LONG.

Date of Succession to Possession or Enjoyment, as Distinguished From Date of Right to Succeed to Possession or Enjoyment.[4]

After the taxing statute.	The same.

Operation and Effect of the Tax as Interpreted By This Court.[5]

No interpretation as to operation and effect of the tax.	Tax imposed not merely on the succession to the possession or enjoyment, but on the *right* to succeed to the possession or enjoyment (quoting from Houston's Estate, 276 Pa. 330).

Generating Source of Transfer of Right to Possession or Enjoyment.[6]

"In that view the tax was imposed upon *an event generated by the death of the decedent.*"	*"Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen."*

[4] In the instant case, the statute was enacted in 1923; the payments of income to the husband began in 1930; the principal has not yet been turned over to the decedent's daughter. In the Coolidge case, the latest amendment to the 1907 Act was enacted in 1921; the property came into the hands of the beneficiaries in 1925.

[5] While a state may impose a tax on the privilege of succeeding to the possession or enjoyment of property, such a tax cannot be imposed apart from one on whatever rights the beneficiary may already have in the property. If, therefore, the beneficiary's rights to the property have been vested in him by a deed of trust or by any other conveyance, a tax on the privilege of the succession to the possession or enjoyment is a tax on his property rights. This proposition is so evident that it requires no demonstration.

[6] The inconsistency of the two conclusions as to the generating sources of the transfers is evident.

NATURE OF THE TAX DOES NOT DETERMINE GENERATING SOURCE OF EVENT TAXED.

The phrase *"In that view"*, beginning the last paragraph of the Court's opinion (rendered January 9th), relates to the nature of the tax, or the taxing statute, as interpreted by the state court.

But we have shown in our main brief (pages 15-17), that the nature of the tax does not determine the nature of the transfer or event sought to be taxed. The two cases of *Nichols v. Coolidge*, 274 U. S. 531 and *Coolidge v. Long*, supra, which involved the identical facts, amply illustrate this proposition. In *Chase National Bank v. United States*, 278 U. S. 327, the petitioner sought to establish a distinction in reference to this question between estate and succession taxes, arguing that while a succession tax might be imposed, an estate tax could not be, just as the appellee here argued that while an estate tax might not be applicable, a succession tax was. After comparing the case with *Saltonstall v. Saltonstall*, 276 U. S. 260, Mr. Justice STONE came to the conclusion (p. 336):

> "But we think that the rule applied * * * to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferror for his own benefit."

So we have the same rule applied in two cases of irrevocable trusts and two cases of revocable transfers, each pair involving an estate tax and a succession tax. And it will be noted that in the two succession tax cases, the interpretation of the state court was identical with that of the court below in the case at bar.

COOLIDGE V. LONG IS SUPPORTED BY A LONG LINE OF DECISIONS.

The conclusion reached in *Coolidge v. Long* is the same as that reached by this Court in a large number of preceding cases.

The following are the cases in which this Court has held that a transfer by an irrevocable trust operated to transfer the property rights by deed, and that the generating source of the transfer was not the death of the donor.

1. In *Shukert v. Allen,* 273 U. S. 546, the settlor transferred property in trust to accumulate the income for some 30 years and then to divide the principal and undistributed income to his children. The question raised and answer given can best be quoted. Mr. Justice HOLMES said (p. 547):

> "The only question is whether the trust was one intended to take effect in possession or enjoyment after his death, as was ruled below.
>
> The transfer was immediate and out and out, leaving no interest remaining in the testator. * * * the interest of the children respectively was vested as soon as the instrument was executed, * * *".

2. In *Nichols v. Coolidge,* 274 U. S. 531, the facts of which are well known to this Court, Mr. Justice MCREYNOLDS, answering the Government's argument that the imposition of the tax constituted an exercise of the Federal taxing power upon a transmission of property by death, said (p. 540):

> "But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death."

3. In *Reinecke v. Northern Trust Co.*, 278 U. S. 339, there were five trusts in each of which there was a provision that the trust was to terminate five years after the settlor's death or on the death of the respective life tenant, whichever should occur first, and the settlor reserved the right to revoke each of these five trusts with the consent of the respective life tenants. This Court held that no estate tax could be imposed, because the property had passed out of the donor's control, as if the gifts had been absolute. In answer to the argument that the trusts were still subject to revocation by the settlor, though with the consent of the beneficiary, Mr. Justice STONE, delivering the opinion of the Court, said (pp. 346-347):

> "He could not effect any change in the beneficial interest in the trust without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

There is a limitation on the proposition that a provision in a trust instrument reserving the right to revoke only with the consent of another renders the trust irrevocable. That limitation is to be found in the case of *Saltonstall v. Saltonstall*, 276 U. S. 260, which will be discussed presently.

4. In *May v. Heiner*, 281 U. S. 238, Mr. Justice McREYNOLDS said with reference to the transfer of property in that case (p. 243):

> "At the death of Mrs. May no interest in the property held under the trust deed passed from her to

> the living; title thereto had been definitely fixed by the trust deed."

5. The same result, as has been shown, was reached in the case of *Coolidge v. Long*, 282 U. S. 582, where a succession tax was involved. In discussing the operation and effect of the transfer, Mr. Justice BUTLER said (p. 597-8):

> "Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. * * * Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession or enjoyment upon the determination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlor. The succession, when the time came, did not depend upon any permission or grant of the Commonwealth."

Mr. Justice BUTLER further said (p. 598):

> "Succession is effected as completely by a transfer of a life estate to one and remainder over to another as by a transfer in fee."

On the other hand, in the cases in which the conclusion reached was that the death of the grantor was the generating source of the transfer, the trusts were held to be revocable in character and therefore the tax applicable.

The case of *Saltonstall v. Saltonstall*, 276 U. S. 260, involved substantially the same facts as *Reinecke v. Northern Trust Co.*, supra, except that the transferror re-

served the right to alter the trust with the concurrence of one of the trustees, rather than one of the beneficiaries. With reference to the question whether the property vested in the beneficiaries by the deed of trust, or whether it remained in the control of the donor, Mr. Justice STONE said (p. 271):

> "The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another. And so the property passing to the beneficiaries here, was acquired only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance."

The reason for the decision in *Saltonstall v. Saltonstall* was further clarified in *Chase National Bank v. United States,* 278 U. S. 327, where the controversy related not to a trust, but to policies of life insurance taxable under Sec. 401 of the Revenue Act of 1921. The Court held that the policies were taxable because the *power* or *control* retained by the decedent over the policies, such as the right to surrender and cancel them, to pledge them as security, etc., clearly indicated that the benefit did not accrue to the beneficiaries or leave the decedent before his death.

In the recent case of *Commissioner of Internal Revenue v. Guggenheim,* decided February 6th, Mr. Justice CARDOZO characterized the termination of the power of revocation in the trusts there involved as follows: "They acquired substance and reality for the first time in July, 1925, *when the deeds became absolute* through the cancellation of the power. (Italics supplied). On the other hand, while the trusts were revocable, he said, "the gifts, from the point of view of substance, were inchoate and

imperfect. By concession there would have been no gift in any aspect if the donor had attempted to attain the same result by the mere delivery of the securities into the hands of the donees. A power of revocation accompanying delivery would have made the gift a nullity."

These cases illustrate the following propositions:

(1) The test for determining whether a trust is revocable or irrevocable is whether the donor retains control of the property up to the time of his death.

(a) If the control or power to revoke depends upon the settlor alone, or upon him and any other person but the beneficiary, the trust is revocable.

(b) If the donor retains no power or control over the property, or if the power to revoke depends upon the beneficiary, then the trust is irrevocable.

(2) A revocable trust is a transfer which for purposes of imposing death duties has its generating source in the death of the grantor.

(3) An irrevocable trust is a transfer which takes its source in the deed transferring the property.

In the present case, when Mrs. Sewell transferred her property in trust in 1926, she parted entirely with the right to revoke or alter the trust. It was an irrevocable trust, and the generating source of the transfer was not her death, but the deed of trust.

II.

The Effective Date Of The Taxing Statute Has No Relation To The Generating Source Of The Event Taxed.

The only difference between the present case and *Coolidge v. Long* is the effective date of the taxing statute in relation to the deed of trust. But the time of the passage of the taxing statute has no bearing on the question whether in a given case the transfer of property rights takes its source in the deed of trust or in the death of the donor. This proposition is self evident. Whether the instrument of transfer is a deed absolute, whether it is made in contemplation of death, whether the transfer is by a trust revocable or irrevocable, whether the transferror retains control over the property or abandons control entirely—these are the factors which determine the source of the transfer of property rights, irrespective of whether death duties are or are not imposed,[7] and if they are, irrespective of whether they are imposed before or after the execution of the instrument of transfer. In *Nichols v. Coolidge*, supra, and *Coolidge v. Long*, supra, where the transfers were made prior to the effective dates of the taxing statutes, death was held to be not the generating source of the transfers. But so it was also held in *Shukert v. Allen*, supra, *Reinecke v. Northern Trust Company*, supra, and *May v. Heiner*, supra, where the instruments of transfer were executed after the dates of the respective taxing statutes. In the cases of the revocable trusts, it was held that death was the generating source, whether created before the effective date of the act, as in *Saltonstall v. Saltonstall*, supra, or after the date of the enactment, as in the case of *Chase National Bank v. United States*, supra.

---

[7] See *Commissioner of Internal Revenue v. Guggenheim*, supra. We assume that the result reached would have been the same, had there been no estate tax at all, but only a gift tax.

III.

The Retroactive Application Of The Taxing Statute In Coolidge v. Long Cannot Be Taken As The Sole Determining Factor In Holding The Tax Unconstitutional.

This brings us to the question whether under any circumstances it can be said that the retroactive application of the statute in *Coolidge v. Long* was *the* determining factor in holding that the tax was unconstitutional, and whether the case at bar can be distinguished from *Coolidge v. Long* on that ground.

If the death of the donor were the generating source of the transfer in *Coolidge v. Long,* then the tax should have been held applicable, as it was held in *Saltonstall v. Saltonstall.* In the latter case, the settlor created a deed of trust between 1905 and 1907, and the trust instrument provided that its terms might be changed and the trust terminated in whole or in part by the settlor with the concurrence of one of the trustees. The question before this Court was whether the Massachusetts statute, as applied, deprived the beneficiaries of their property without due process of law, because it was retroactive as to them. The beneficiaries claimed under the trust made before 1907, when the first inheritance tax statute was passed, and this Court therefore found it necessary to determine whether the property rights vested in them prior to the effective date of that act. Having determined that those rights had not vested prior to the first inheritance tax statute, because the trust was revocable, the Court concluded that the tax was not retroactively applied. In other words, *the test of retroactivity in such cases is not whether the deed was executed before the passage of the Act, but whether the death occurred prior to the passage of the Act.*

The reason for taking the date of the transfer as the determining date for the retroactivity of the taxing statute in *Coolidge v. Long* was that the rights had vested under the deed of trust, and the death was not the generating source of the transfer. But then, even without a retroactive statute, a death duty so imposed would nevertheless be without due process under the decisions of this Court in *Schlesinger v. Wisconsin*, 270 U. S. 230 and *Heiner v. Donnan*, 285 U. S. 312, namely, that *death duties cannot be imposed on transfers which are not testamentary or testamentary in effect.*

We gave thorough consideration to the *dictum* in *Coolidge v. Long*, concerning the possible results if there were no retroactive applications of the statute, when we answered the appellee's motion to affirm. In that answer (p. 4-5) we pointed out that the second sentence of the *dictum* must be read in conjunction with the first sentence for an explanation of the qualifying terms "such an excise" and "so passing". Justice BUTLER's *dictum* in *Coolidge v. Long* (p. 596) reads as follows:

> "In its opinion, the state court suggests that the federal estate tax was upon property of the deceased transferred at his death and that it was levied upon a subject 'quite different from the succession to property by a beneficiary, which is the subject of the present excise'. Undoubtedly the state has power to lay such an excise upon property so passing after the taking effect of the taxing Act".

We interpreted that statement to mean that the state could impose a prospective tax similar to the federal estate tax, subject, of course, to whatever other constitutional limitations there may be on the estate tax. One of those limitations is that the tax must be imposed on an event the generating source of which is the death of the transferror.

The construction of that *dictum*, embodied in the opinion of this Court, rendered January 9th, deprives the decision of *Coolidge v. Long* of its reasonable basis. If the tax in the case at bar is held to be a tax on succession to the possession or enjoyment of the property, and within the Constitution because not retroactively applied, it must be also noted that the tax on the succession to the possession or enjoyment of the property in *Coolidge v. Long* was also not retroactively applied. That succession took place in 1925, and the Massachusetts tax was imposed in 1921.

This was pointed out in the dissenting opinion of Mr. Justice ROBERTS, but the argument was not accepted by the Court, because the tax *in its operation and effect* was not on the mere succession to the possession or enjoyment, but on the right of succession to possession or enjoyment which was generated not by the death of the grantor, but by the deed. The situation is exactly the same in the case at bar, except for one difference in favor of the appellant herein. Having held in *Coolidge v. Long* that the rights had vested in the beneficiaries under the deed of trust, the Court also held that the state could not impose the tax, because the rights of the beneficiaries to possession or enjoyment no longer depended on the state. Mr. Justice BUTLER said (p. 598):

> "The succession, when the time came, did not depend upon any permission or grant of the Commonwealth. While the sons if occasion should arise might by appropriate suit require the trustees to account, it is to be borne in mind that the property was never in the custody of the law or of any court. Resort might be had to the law to enforce the rights that had vested. But the Commonwealth was powerless to condition possession or enjoyment of what had been conveyed to them by the deeds."

Four members of the Court dissented from that view. Justice ROBERTS, delivering the dissenting opinion, said (p. 611):

> "But it is obvious that the children did rely on the law of Massachusetts for their right to receive the trust property from the trustees; and it might well have been they would have had to resort to her courts to obtain possession. All the law applicable to the administration of trusts, regulating the acts of trustees, giving remedies to trustees' defaults, providing for their compensation, and requiring the full execution of their fiduciary duties, was available to appellant. Without it their future interest, by way of remainder, might have been the merest shadow."

But there can be no disagreement on this point in the case at bar. Here the settlor transferred the property in New York to a New York Trust Company. Had the beneficiaries experienced, or should they experience any difficulty in the matter of obtaining their share of the property, their rights would depend not on the law of Connecticut, but on the law of New York. In other words, if the Massachusetts tax was inapplicable, then *a fortiori* the Connecticut tax must be held inapplicable.

IV.

The Question Presented Is Important. The Judgment Below Cannot Be Sustained Except By A Departure From Former Decisions. Justice To The Litigants And The Principles Of Certainty And Stability In The Law Require That Such Departure Be Supported By Cogent Reasons.

The question presented in this case is a very important one: *Can a gift inter vivos made through an irrevocable trust and not in contemplation of death be subjected to*

death duties? In view of the uniform rulings of this Court concerning the effect of transfers of property by irrevocable trusts, and especially in view of the statement in *Coolidge v. Long* (p. 598) that

> "Succession is effected as completely by a transfer of a life estate to one and remainder over to another as by a transfer in fee.",

it cannot be said that the question is unimportant, any more than that could be said of the question whether death duties may be imposed on a transfer in fee absolute made *inter vivos* and not in contemplation of death. It is true, the precise question has never been directly decided by this Court, but we believe we have demonstrated that the logical sequence of the cases which have been decided leads to the conclusion that such a tax cannot be sustained.

Although we maintain that the decision in this case rendered on January 9th is not compatible with *Coolidge v. Long* and the cases which preceded it, we realize that the doctrine of *stare decisis* does not compel this Court to adhere under all circumstances to its prior decisions. This Court may find it necessary, or desirable, or expedient to depart from the law as heretofore laid down, either by overruling its prior decisions, as was done in

Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204;
Baldwin v. Missouri, 281 U. S. 586;
Fox Film Corporation v. Doyal, 286 U. S. 123.

or by distinguishing the case at bar from the previous cases, as was done in

Educational Films Corp. v. Ward, 282 U. S. 379;
Pacific Co. Ltd. v. Johnson, 285 U. S. 480.

But the decisions of this Court are of great authority; their effect goes far beyond the controversy in the particular case; they are the source of certainty and stability in the law, especially on questions of constitutional law. Therefore, in the interest of certainty and stability, a departure from previous decisions should not be made, unless supported by cogent reasons. As Mr. Justice FIELD said in *National Bank of Gennessee vs. Whitney,* 103 U. S. 99, 102:

> "Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reason, certainly not because of subsequent doubts as to their soundness."

A departure from previous decisions should not be supported by a mere *dictum* which is in conflict with the reasons necessary to the decision of the same case. The *ratio decidendi* of *Coolidge v. Long* was that the retroactive statute was unconstitutionally applied, *because the death of the grantor was not the generating source of the transfer.* The *dictum,* as interpreted by the decision in the present case, was that a similar prospective tax would be valid, *because the event taxed was generated by the death of the decedent.* The conflict between the *dictum* and the *ratio decidendi* is evident. As between the two, the latter is of far greater authority. As was said by Mr. Justice VANDEVANTER in *Ex Parte Bakelite Corporation,* 279 U. S. 439, 455:

> "And any weight the dictum, as such, might have, is more than overcome by what has been said on the question in other cases, where there was need for considering it."

This is especially so where the *dictum* is in conflict with the *ratio decidendi* of the same case.

A departure from prior decisions should not be based on *any dictum*, even if not in direct conflict with the *ratio decidendi* of the same case or of other cases. This Court has often reiterated the proposition that a former *dictum* should not control the judgment in a suit in which the point is directly presented.

Harriman v. Northern Securities Co., 197 U. S. 244, 291;
Myers v. United States, 272 U. S. 52, 142;
Pacific Co. v. Peterson, 278 U. S. 130, 136.
Sterling v. Constantin, decided Dec. 12, 1932.

Most of the statements on this point go back to the principle laid down by Chief Justice MARSHALL in *Cohens v. Virginia*, 6 Wheat. 264, 399:

> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with a case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided but their possible bearing on all other cases is seldom completely investigated."

Decisions on the basis of *dicta*, rather than on the reasons of prior decisions, will lead to much confusion and uncertainty in the law. The case of *Coolidge v. Long* is an excellent illustration of the confusion which would result from such judicial process.

Within the space of one month, this Court has upheld one *dictum* and overruled another *dictum* of *Coolidge v.*

Long. In the case at bar this Court upheld the *dictum* which, we have shown, is in conflict with the *ratio decidendi* of the case. In *Gwinn v. Commissioner of Internal Revenue* decided December 5, 1932, this Court overruled the *dictum* in *Coolidge v. Long* (p. 599), which limited the application of *Tyler v. United States,* 281 U. S. 497, to cases where "the estate was created after the passage of the applicable Act; and none of the property constituting it had prior to its creation ever belonged to the surviving spouse." Surely it cannot be said that, in deciding *Gwinn v. Commissioner of Internal Revenue,* it was entirely a matter of choice to hold that the transfer was taxable because the decedent had remained in control of the property until his death, or to hold that the transfer was not taxable because it was "the settled conviction of this Court", when deciding *Coolidge v. Long,* that such tax may be imposed only if the joint tenancies were created after the passage of the taxing statute.

Evidently not all the dicta can be regarded as expressive of the law. But *for future guidance,* which of them should and which should not be regarded as the law? That, after all, is the test for certainty and stability.

CONCLUSION.

In view of the fact that the case at bar is properly within the appellate jurisdiction of this Court, and that appellant had a reasonable right, relying on the former decisions of this Court, to assume that the source of the transfer in question was not the death of the decedent, but the deed of trust, we submit that the appellant never had an opportunity to demonstrate to this Court the truth of this premise, and appellant prays that it be af-

forded an opportunity to do so in a rehearing of this cause.

Respectfully submitted,

Dated: February, 1933.

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Washington, D. C.,

Of Counsel.

CERTIFICATE OF COUNSEL.

I, GREGORY HANKIN, of counsel for the above named appellant do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

GREGORY HANKIN.

SUPREME COURT OF THE UNITED STATES.

No. 217.—October Term, 1932.

The Guaranty Trust Company of New York, as Executor of the Last Will and Testament of Harriet D. Sewell, Deceased, Appellant, *vs.* William H. Blodgett, Tax Commissioner.	Appeal from the Superior Court of Fairfield County, State of Connecticut.

[January 9, 1933.]

Mr. Justice Sutherland delivered the opinion of the Court.

The Connecticut succession tax act of 1923 contains the following provision:

"All property and any interest therein owned by a resident of this state at the time of his decease, . . . which shall pass by will or inheritance under the laws of this state; and all gifts of such property by deed, grant or other conveyance, made in contemplation of the death of the grantor or donor, or intended to take effect in possession or enjoyment at or after the death of such grantor or donor, shall be subject to the tax herein prescribed." Chap. 190, Pub. Acts, 1923, § 1.

On December 28, 1926, while this act was in force, Harriet D. Sewell executed an irrevocable deed of trust to appellant, transferring certain securities, by which deed it was provided that the trustee collect the income and pay it to Mrs. Sewell during her life. Thereafter, the income was to be paid to her husband for his life, and upon his death the trustee was directed to pay and transfer the principal of the trust absolutely to their daughter if she survived, but if not, then to the issue of the daughter, with a gift over in default of such issue. Mrs. Sewell died May 20, 1930, domiciled in Connecticut.

The state supreme court held that the statute recognized the distinction between taking effect in possession or enjoyment and vesting in right, title or interest, and intended to reach a shifting of the enjoyment of property although such shifting followed necessarily from a prior transfer of title *inter vivos;* that within the meaning and description of the statute, the transfer in question was a gift intended to take effect in possession or enjoyment

at or after the death of the donor, and, therefore, was subject to the succession tax; and that the imposition of such tax did not offend against the Fourteenth Amendment or any other provision of the federal Constitution. 114 Conn 207.

Appellant first contends that while the court below expressly upheld the tax under the act of 1923, it nevertheless gave effect to the later and more specific act of 1929 (Pub. Acts, c. 299, §§ 1 and 2), and thereby the contract impairment clause of the federal Constitution was infringed. This contention must be rejected. We are not at liberty to disregard the explicit holding of the state court as to the basis of its decision, except for convincing reasons, which here we are unable to find. Compare *Columbia Ry.* v. *South Carolina,* 261 U. S. 236, 245-247. The entire effort of the court upon this point plainly was directed towards sustaining the view that the event sought to be taxed fell within the provisions of the act of 1923. There is a reference to the act of 1929, but the decision is definitely put upon the act of 1923, and is supported by considerations of such weight as to leave no occasion for dependence upon the later act; and the supposition that in fact effect was given to it is without warrant.

Since the court below construed the act of 1923, without regard to the act of 1929, as embracing the event sought to be taxed, and since in that view the question of contract impairment does not arise, we are bound by the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* — U. S. — (December 5, 1932); *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32.

In that view the tax was imposed upon an event generated by the death of the decedent. That such a tax does not conflict with any provision of the federal Constitution is clearly stated by this court in *Coolidge* v. *Long,* 282 U. S. 582, 596. There a similar tax was held bad because the state statute imposing it was passed after the creation of the trusts; but the court said: "Undoubtedly the State has power to lay such an excise upon property so passing after the taking effect of the taxing Act." While, strictly, that statement was not necessary to the decision, we follow it as expressing the settled conviction of this court, and, so far as the federal Constitution is concerned, sustain the validity of the act of 1923 as construed by the state court.

Judgment affirmed.